Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), should be expanded, in a manner that conflicts with decisions of this Court and of the lower courts, to eliminate full First Amendment protection for concededly truthful lists of selected names, addresses, and other information regarding consumers based on the theory that such speech by its nature does not relate to matters of "public concern."

2. Whether an administrative ban on speech can satisfy intermediate First Amendment scrutiny in the absence of any evidence that it is narrowly tailored to an important governmental interest, based solely on judicial speculation that "Congress apparently believe[d]" the action taken by the agency was warranted.

LIST OF PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states that the parties to the proceeding in the court of appeals were:

Trans Union LLC
Federal Trade Commission

The parties before the Federal Trade Commission were:

Trans Union LLC
Federal Trade Commission

RULE 29.6 STATEMENT

Trans Union LLC is a limited liability company organized under the laws of the State of Delaware. Trans Union Corporation became Trans Union LLC on December 31, 1998. Trans Union does not have any parent companies or subsidiaries that have issued shares or debt securities to the public. Trans Union LLC has an affiliate, Union Tank Car Co., which has issued debt securities to the public.

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PETITION FOR WRIT OF CERTIORARI

Trans Union LLC ("Trans Union") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 245 F.3d 809. The opinion on rehearing is reported at 267 F.3d 1138 (Pet. App.16a-23a). The decision of the Federal Trade Commission (Pet. App. 25a-64a) is reported at 2000 FTC LEXIS 23.

JURISDICTION

The court of appeals issued its decision on April 13, 2001. Trans Union's timely petition for rehearing was denied on October 23, 2001. Pet. App. 16a. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

The relevant portions of the Fair Credit Reporting Act are reprinted in the Appendix. Pet. App. 68a-79a.

STATEMENT

This case involves a decision by the Federal Trade Commission (FTC) banning speech by petitioner Trans Union. The speech takes the form of lists of selected names, addresses, and other information communicated by Trans Union to a wide variety of organizations, including for-profit companies, political groups, and charitable entities, which in turn use that information to offer goods or services to, or to solicit charitable and political

contributions from, people included on those lists. For example, Trans Union and its affiliates have provided lists to the National Republican Committee so that the RNC might solicit citizens to make campaign contributions (A0841-46, A2376-77);[1] to Aetna Insurance and Prudential Insurance so that they might invite persons aged 65 or older to apply for health insurance (A2375-76); to the United Way so that it might solicit individuals to make donations (A2376); and to American Tourister to enable it to send consumers discount coupons (A1992-A2003, A2378).

The D.C. Circuit held that Trans Union's speech could be prohibited because it "relates to no matter of public concern." Pet. App. 13a. Further, the court held that the prohibition was narrowly tailored to protect consumer privacy because "Congress apparently believe[d]" it was warranted. *Id.* at 22a. The decision below presents significant First Amendment questions in the increasingly important context of privacy rights. This Court's review is urgently needed.

1. Statutory Background.

The Fair Credit Reporting Act ("FCRA" or "Act") regulates the circumstances under which a credit reporting agency such as Trans Union may disclose a "consumer report" – the statutory term for information commonly referred to as a credit report. *See TRW, Inc. v. Andrews*, 122 S. Ct. 441, 444-45 (2001). Section 603(d) of the FCRA defines a "consumer report" as "[a]ny written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's

[1] Citations to "A.___" refer to the appendix in the court of appeals. Citations to "Tr. __" refer to the transcript before the FTC. Citations to "TU-__" refer to Trans Union's exhibits before the FTC.

eligibility for . . . credit or insurance . . . [or] employment." 15 U.S.C. § 1681a(d). Section 603(f) provides a corresponding definition of "consumer reporting agency." *Id.* at § 1681a(f). Section 604 of the FCRA allows the disclosure of consumer reports for certain "permissible purposes," such as employment decisions, determinations of license eligibility, risk assessments for existing credit obligations, or other legitimate business needs. *Id.* at § 1681b. Section 607 of the Act requires credit reporting agencies to maintain procedures to ensure that they furnish consumer reports only for the purposes set forth in Section 604. *Id.* at § 1681e(a).

Congress expressly acknowledged the "vital role" of credit reporting agencies "in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(1) and (3). The FCRA Committee Report also cited the "vital role" of credit reporting agencies in the economy. S. Rep. No. 91-517, at 2 (1969).

Beginning in the 1970s, the FTC began to allow credit reporting agencies to engage in target marketing as a "business transaction" with a consumer and required certification that every person on a target marketing list "will be the subject of an offer to enter into the particular business relationship involved." 16 C.F.R. § 600.5(d) (1974-1900). Not until 1990 did the FTC narrow such target marketing to offers of credit. 16 C.F.R. § 600, App. § 603 (1990).

The only FTC findings with respect to potential harm to consumers from target marketing appear in a 1990 Commentary issued by the Commission. In a preamble to that Commentary, the FTC found that the harms to consumers from credit target marketing were "insignificant" and that any privacy invasion was "modest." 55 Fed. Reg. 18804 n.14 (II, IV) (May 4, 1990).

In 1996, Congress adopted amendments to the FCRA allowing the disclosure of consumer reports for target marketing

for credit and insurance ("prescreening"). Section 1681b(c) provides that a consumer reporting agency may furnish a consumer report in connection with any credit or insurance transaction that is not initiated by the consumer if "the transaction consists of a firm offer of credit or insurance." 15 U.S.C. § 1681b(c)(1)(B)(i). The FCRA further provides that a consumer may elect to opt out of credit and insurance target marketing. *Id.* at §§ 1681b(e), 1681m(d)(1).

2. Trans Union's Target Marketing.

Trans Union is one of three major credit reporting agencies in the United States. It engages in three different activities: (i) traditional credit reporting; (ii) permitted target marketing in the form of credit and insurance prescreening; and (iii) other forms of target marketing, using a subset of the information in Trans Union's credit database as well as purchased information ("target marketing").

Both prescreening and other kinds of target marketing involve the communication of lists of consumer names and addresses having certain characteristics. Prescreening is designed to identify consumers who qualify for a particular credit or insurance offer and consequently involves the analysis and disclosure of credit performance information. Target marketing is designed to identify a group or market of consumers who may be interested in an offer. It does not involve the examination or disclosure of credit performance information. For example, in the prescreening context, a Trans Union client interested in making a "firm" offer for a home equity loan would receive a list of homeowners meeting specific credit performance criteria, together with summaries of their individual credit performance. A target marketing client offering home furnishings would obtain a list of consumer names and addresses who are homeowners (identified by the fact that they have a mortgage), with no summary of credit performance. Trans Union excludes from both lists any consumer who has elected to opt out of credit and

insurance prescreening.

Target marketing has enormous economic implications. The total gross annual revenue of the approximately 15,000 companies supplying direct marketing lists is approximately $1.5 billion. (Tr. 3320-21, 337). The national sales revenue generated by direct marketing to consumers was $640 billion in 1996 and $684.6 billion in 1997, representing 11.7% and 11.9%, respectively, of total U.S. consumer sales. (A2020-A2202, A2682-86). In a 1996 Equifax/Harris Consumer Privacy Survey supervised by Dr. Alan Westin, 58% of the consumers surveyed responded that they or someone in their household had purchased something from a mailing they had received. (TU-88; Tr. 3606, 3656-65). Such figures do not include charitable and political contributions made on the basis of target marketing. Over 13.2 million workers were employed in 1996 and 1997 as a result of consumer direct marketing. (TU-202).

3. *Trans Union I.*

On December 15, 1992, the FTC filed an administrative complaint against Trans Union, asserting violations of §§ 604 and 607 of the FCRA. *In re Trans Union Corporation*, 116 F.T.C. 1334 (1993). The FTC alleged that Trans Union's target marketing lists qualified as "consumer reports" within the meaning of the statute.

On September 28, 1994, the FTC entered summary judgment against Trans Union. The FTC ordered it to "cease and desist from distributing or selling consumer reports, including those in the form of target marketing lists" in violation of the FCRA. *In re Trans Union Corporation*, 118 F.T.C. 821, 869-70 (1994). Trans Union contested the FTC's determination and sought review in the D.C. Circuit.

On April 19, 1996, the court of appeals vacated the FTC's order and remanded the case for a full hearing on the merits before the FTC. *Trans Union I*, 81 F.3d 228 (D.C. Cir. 1996).

The D.C. Circuit expressed "serious doubt" about whether Trans Union's target marketing lists qualified as "consumer reports" and opined that Trans Union "raises a serious First Amendment claim with respect to the Act's application." *Id.* at 235.

4. The Hearing Before the FTC On Remand.

On remand, the FTC conducted a hearing before an administrative law judge in 1998. The judge found against Trans Union, but uncontradicted evidence made clear that Trans Union's target marketing lists are not "consumer reports" within the meaning of the FCRA because the data contained in those lists are used to identify potential markets for goods and services and are not used as factors in establishing a particular customer's eligibility for credit. Instead, credit eligibility is determined according to credit payment history. *E.g.*, A4185-86, 4200-01, 4351-53.

Moreover, the evidence was uncontradicted that the threat to privacy from target marketing is significantly less than that from prescreening, which is authorized under the FCRA. Prescreening involves the use of detailed credit performance information – revealing, for example, how a given consumer pays her bills and whether she pays them on time – to select individuals for offers of credit or insurance. The FTC has nonetheless concluded that, in prescreening, "there is relatively insignificant harm to the consumer because the privacy infringement is minimal" and that any "invasion of the consumer's privacy" is "modest" when "his or her credit record is reviewed in the prescreening process." 55 Fed. Reg. 18804, 18807 & n.14 (II 4) (May 4, 1990).

The evidence showed that credit providers made approximately 1.8 *billion* credit prescreening offers to credit-qualified American consumers in 1997. (TU-184, Tr. 2176-2178). Thus, in one year alone, credit reporting agencies disclosed to credit and insurance providers detailed financial information regarding the majority of the adult population in the United States. Against this background of pervasive

prescreening, the computerized disclosure of manifestly *less* invasive (and often public-record) information in connection with other forms of target marketing – *e.g.*, that a consumer has a mortgage or a bank card – seems hardly noticeable in terms of consumer privacy.

The evidence also established that prescreening cannot be deemed more socially valuable than other forms of target marketing. Only about 1 to 2 percent of consumers who receive prescreening offers respond to them. Tr. 538-539, 619, 728, 2375-2376, 3173. Further, a prescreening offer is not a guarantee; it is subject to the terms in the offer and to post-offer review by the credit or insurance company. 15 U.S.C. § 1681a(l). As the ALJ found, "when a consumer responds and accepts a firm offer of credit, a credit grantor can then review the customer's credit report and deny the customer the credit offered if the consumer's credit report reflects something negative about the consumer's credit performance." As one witness explained, the prescreening offer of credit or insurance is "anything but firm. It's mush, it's not a firm offer." Tr. 2547. Only 70 to 80 percent of consumers who respond to these "firm" offers are ultimately approved. Tr. 2646-47. The undisputed evidence from the administrative hearing below – in fact, from witnesses called by the FTC itself – was that the purpose of credit prescreening is merely to switch good credit customers from one credit grantor to another. A4173-74.

The undisputed evidence showed that target marketing reduces the amount of unwanted solicitations by, for example, allowing advertisers to exclude persons who probably would not be interested in purchasing the product or service being offered, and allowing fundraisers to exclude persons without bank cards would not be readily able to contribute to a cause being promoted by phone. A2345-46, A2602-08, A4360-61. There was no evidence that target marketing causes embarrassment or humiliation. Moreover, the evidence underscored the significant benefits to consumers and our national economy from target

marketing. Tr. 3320-21, 3606, 3656-65, A2202, A2682-86, TU-88, TU-202.

5. The FTC's Decision.

Notwithstanding this record, the FTC adhered to its view that Trans Union's lists qualified as "consumer reports" and were accordingly prohibited by the FCRA. The FTC necessarily acknowledged that Trans Union's lists constitute "speech" for purposes of the First Amendment "because they communicate substantial consumer information to Trans Union's target marketer customers." Pet. App. 37a. Nonetheless, the FTC determined that "Trans Union's lists are not fully protected speech and thus we decline to apply strict constitutional scrutiny to the FCRA." *Id.* at 40a n.59. The FTC reasoned that, under *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), "the level of protection [a] Court should give to a consumer report turn[s] on whether the record concerned *public* or *private* matters." Pet. App. 39a. "'[S]peech solely in the individual interest of the speaker and its specific business audience' . . . deserve[s] reduced First Amendment protection." *Id.* (quoting plurality opinion in *Dun & Bradstreet*).

6. The Decision Below.

On a second petition for review, the D.C. Circuit upheld the FTC's determination that Trans Union's target marketing lists qualified as "consumer reports" under the FCRA, even though the information they contained was not used as a factor in determining consumers' eligibility for credit. Pet. App. 1a-15a. The court also rejected Trans Union's First Amendment objection by holding that the information "communicated by Trans Union target marketing lists is solely of interest to the company and its business customers and relates to no matter of public concern." *Id.* at 13a. Accordingly, even though the lists disclosed truthful information which the court nowhere found to be embarrassing or humiliating, the D.C. Circuit held that they "warrant[ed] 'reduced constitutional protection.'" *Id.* at 13a

(quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 n.8 (1985)). The court brushed aside any argument that the FTC's ban on speech was content-based, even though, under the FTC's interpretation of the statute, "prescreening" speech favored by the government is allowed, while other target marketing is prohibited – so that whether speech is permitted or banned by the FTC depends on what the marketer says.

The court next held that the FTC's ban satisfied reduced, or intermediate, First Amendment scrutiny despite the FTC's failure to consider the obvious consumer opt-out alternative, a method approved by Congress for prescreening information more invasive of privacy, because the government "had no obligation to choose the least restrictive means of accomplishing its goal." *Id.* at 14a. Similarly, the court held that the prescreening exception did not demonstrate an absence of narrow tailoring, even though it results in the disclosure of significantly more invasive information about consumers. *Id.*

7. The Decision on Rehearing.

On May 25, 2001, Trans Union filed a petition for rehearing and rehearing en banc. The court ordered the FTC to file a response to the petition. Thereafter, the panel ordered the parties to file supplemental briefs "addressing the impact of *Lorillard Tobacco Co. v. Reilly*, [121 S. Ct. 2404 (2001)], on the question of whether Congress' failure to consider or adopt an opt-out scheme demonstrates that the FCRA is not sufficiently tailored to survive intermediate First Amendment scrutiny."

On October 23, 2001, the D.C. Circuit denied rehearing and rehearing en banc. The panel issued a second opinion clarifying and reaffirming its earlier decision. The D.C. Circuit held that Trans Union's speech "concern[ed] no public issue" (Pet. App. 16a) (internal quotation omitted) and was therefore governed by this Court's decision in *Dun & Bradstreet*. "Trans Union's

target marketing lists comprise speech of purely private concern." *Id.* at 17a.

On the basis of its determination that Trans Union's speech – essentially by definition – did not involve matters of public concern, the D.C. Circuit held that the otherwise content-based distinction drawn by the FTC between (1) insurance and credit prescreening, and (2) other forms of target marketing did not trigger heightened First Amendment scrutiny and was not constitutionally problematic:

> [Trans Union] argues that . . . the FCRA makes a content-based distinction deserving of strict scrutiny. The notion that content-based speech restrictions warrant strict scrutiny, however, derives from cases involving fully protected speech. Trans Union's target marketing lists are private speech warranting only qualified constitutional protection.

Pet. App. 18a-19a (citations omitted).

The D.C. Circuit also confirmed on rehearing that it deemed the narrow tailoring requirement of intermediate scrutiny to be satisfied, even though prescreening offers of credit and insurance result in the disclosure of more detailed credit information about individual consumers than does target marketing. The court of appeals conceded that the statute manifests a "differential treatment of information sold for prescreening and that sold for target marketing." Pet. App. 21a. The court did not deny that Trans Union's FTC-prohibited target marketing is far less invasive of financial privacy than is FTC-permitted prescreening. But the court of appeals held that the disparity in treatment did not demonstrate a lack of narrow tailoring for the simple reason that "Congress *apparently believes* that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." *Id.* at 22a (emphasis added). The D.C. Circuit made no mention of the prescreening exception for offers of *insurance* as opposed to *credit*. Nor did

it identify any *evidence* or *factual finding* to support Congress' "apparent[] belie[f]" that the disparity in treatment between prescreening and other sorts of target marketing was warranted by facts bearing on the interest in financial (or other) privacy.

REASONS FOR GRANTING THE WRIT

This case presents substantial First Amendment questions warranting this Court's review, and it presents those questions in an area – informational privacy – which is an increasingly significant legal context.

At issue is the FTC's decision to ban target marketing speech in the name of privacy, and to escape the ordinary burdens of the First Amendment by (1) denigrating the public importance of the speech involved and (2) imputing to Congress a fictional determination that is directly contrary to the findings Congress actually made. (*See* p. 26, *infra*.) Worse, the FTC squarely confronted the constitutional question by eschewing a more limited, and more plausible, construction of the applicable statute that would have recognized that Trans Union's target marketing lists do not qualify as "consumer reports" in the first place. Such an interpretation would have avoided the constitutional question. *See DeBartolo Corp. v. Florida Gulfcoast Building & Constr. Trades Council*, 485 U.S. 568, 574-77 (1988).[2]

The D.C. Circuit approved the agency's administrative charade. In so doing, the court of appeals expanded *Dun & Bradstreet* beyond all recognition and stretched a pinprick exception from normal free speech jurisprudence into a gaping hole for speech that the judiciary decides to demote to an "only private interest" status. In addition, the D.C. Circuit watered down intermediate First Amendment scrutiny into what is

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[2] The FTC expanded the FCRA's definition of "consumer report" to include all information about a consumer whether used for credit eligibility or not. Pet. App. 33a-34a. A narrower definition consistent with the FCRA would have excluded the information used by Trans Union in target marketing.

essentially rationality review, by holding that a government ban on speech may be sustained so long as a court finds that "Congress apparently believes" it is warranted. Accordingly, this Court's review is urgently needed.

A. THIS IS AN IMPORTANT CASE.

The development of extensive computer databases and the emergence of the Internet have underscored the significance of privacy rules and their relationship to the First Amendment. Personal information is increasingly captured in electronic form and thus amenable to the efficiencies of computer retrieval, search, and communication. Today's news headlines are replete with reports that privacy, especially in relation to freedom of communication, has become one of the leading issues of the Twenty-first century.[3]

Professor Alan Westin, who figured importantly in the passage of the FCRA, Pet. App. 41a, has put the issue in historical context: "If you start with the Greek city-state and run through the Middle Ages into early parliamentary institutions, and then to the American Republic, privacy remained largely unchanged by technology."[4] "But in the 1960s we reached a watershed. That was the moment computer systems began to

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[3] *See* U.S. Dep't Of Commerce, PRIVACY AND SELF-REGULATION IN THE INFORMATION AGE (1997); Jeffrey Rosen, THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA (2000); Jennifer Bresnahan, *Personalization, Privacy, and the First Amendment: A Look at the Law and Policy Behind Electronic Databases*, 5 VA. J.L. & TECH. 8 (2000); Robert E. Litan, *Law and Policy in the Age of the Internet*, 50 DUKE L.J. 1045 (2001); *Symposium Data Privacy Laws and the First Amendment: A Conflict?*, 11 FORDHAM I.P., MEDIA & ENT. L.J. 3 (2000); *Symposium: Privacy & the Law*, 67 GEO. WASH. L. REV. 1097 (1999); *Symposium: Cyberspace and Privacy: a New Legal Paradigm?*, 52 STAN. L. REV. 1003 (2000); *Symposium: The Unwanted Gaze, by Jeffrey Rosen*, 89 GEO. L. REV. 2013 (2001).

[4] *The Searchable Soul: Privacy in the Age of Information Technology*, HARPER'S, Jan. 2000, at 58.

arrive with large-scale databases and remote terminals. Now we're in the second modern revolution in privacy. The Internet is transforming the way people reveal themselves."[5]

This Court has already begun to confront privacy issues in the electronic age. *See, e.g., Bartnicki v. Vopper*, 121 S. Ct. 1753 (2001) (holding that media defendants who disclosed a cell phone conversation that had been illegally intercepted by others could not be subject to civil liability under the First Amendment); *Reno v. Condon*, 528 U.S. 141 (2000) (upholding federal Driver's Privacy Protection Act of 1994, which restricts disclosure of information collected by state departments of motor vehicles); *cf. Kyllo v. United States*, 533 U.S. 27, __, 121 S. Ct. 2038, 2043 (2001) (confronting Fourth Amendment question of "what limits there are upon this power of technology to shrink the realm of guaranteed privacy").

These decisions, however, have been deliberately contextual, with holdings that have been carefully limited to the particular circumstances presented, *see Bartnicki*, 121 S. Ct. at 1764-65; *id.* at 1768 (Breyer, J., concurring), or technologies involved, *see Kyllo*, 121 S. Ct. at 2043-46, or that have addressed Congress' affirmative power without inquiring into the First Amendment limits on that authority. *See Reno*, 528 U.S. at 151. Against that backdrop, it is critical for this Court to hold that meaningful First Amendment scrutiny must be given to laws prohibiting truthful, non-embarrassing communications between willing speakers and willing audiences in order to protect a generalized interest in privacy. This Court needs to make clear, in other words, that privacy is no talisman whose mere invocation (or, indeed, genuine involvement) somehow dissolves time-honored and tradition-tested categories of First Amendment analysis. The First Amendment limits the power of government to restrict "expression, even in order to protect the privacy of other

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[5] *Id.*

individuals."[6] *See also* Eugene Volokh, *Freedom of Speech and Information Privacy*, 52 STAN. L. REV. 1049, 1122 (2000) (concluding that privacy "restrictions on speech that reveals personal information" are typically unconstitutional); Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, 11 FORDHAM I. P., MEDIA & ENT. L.J. 97, 152 (2000) ("Restricting companies' use of information about transactions and consumer preferences raises troublesome First Amendment issues. . . . . [C]ourts should be skeptical of privacy regulation . . . . ").

This case is the logical successor to *Los Angeles Police Dept. v. United Reporting Corp.*, 528 U.S. 32 (1999), which implicated but did not decide important questions about the relationship between privacy rights and the First Amendment. In *LAPD*, this Court granted certiorari to review a California statute that prohibited the release of arrest information for commercial purposes but permitted it for "journalistic, scholarly, political, governmental, or investigative purposes." The Ninth Circuit had held that the governmental interest in protecting the privacy of arrestees was substantial but that the exceptions to the statute precluded it from advancing the privacy interest in a direct and material way. 146 F.3d 1133 (9th Cir. 1998). A majority of this Court treated the case as one involving selective access to government information and reversed the Ninth Circuit's judgment on the ground that "[t]his is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses." 528 U.S. at 40. However, in a series of separate opinions, several Justices expressed keen interest in the privacy and First Amendment issues presented. Justice Scalia, joined in a concurring opinion by Justice Thomas, opined that the difference between facial and as-applied challenges was determinative and that:

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[6] Fred H. Cate, PRIVACY IN THE INFORMATION AGE 55 (Brookings 1997).

> it is an entirely different question whether a restriction upon access that *allows* access to the press (which in effect makes the information part of the public domain), but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information.

Id. at 42. Justice Ginsburg, joined in a concurring opinion by Justices O'Connor, Souter, and Breyer, explained that the California statute was "properly analyzed as a restriction on access to government information, not as a restriction on protected speech." *Id.* at 42. Justice Ginsburg's concurrence found it determinative that "the statute at issue does not restrict speakers from conveying information they already possess. Anyone who comes upon arrestee address information in the public domain is free to use that information as she sees fit." *Id.* Justice Stevens, joined by Justice Kennedy, would have held the California statute invalid under the First Amendment on the ground that "the denial of access is based on the fact that respondent plans to publish the information to others who, in turn, intend to use it for a commercial speech purpose that the State finds objectionable. . . . [T]he First Amendment supports the third parties' use of it for commercial speech purposes." *Id.* at 46 (dissenting opinion).

The instant case is the natural follow-on to *LAPD*. This case involves the ability of the government to prohibit the communication of information that is already within a speaker's lawful possession. Trans Union's information is its own, unlike the LAPD's arrest records. The First Amendment protects communications by Trans Union to its clients, as well as speech by those clients to consumers and the public. *See Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979) (holding, unanimously, that freedom of speech is not lost to the speaker "who arranges to communicate privately . . . rather than to spread his views before the public" directly).

Neither the FTC nor the D.C. Circuit ever found that the information involved in target marketing was embarrassing, humiliating, or intrusive. Yet the FTC's prohibition is defined by the *content* of the information the speaker wishes to impart as well as by the communicative *uses* that the information's recipient wishes to make of it. Moreover, the line between the communications permitted and those prohibited, while drawn in the *name* of consumer privacy, in fact allows communications that manifestly entail *greater* dangers to privacy interests than those posed by the communications it *forbids*. That glaring mismatch between the prohibition and the asserted privacy interest distinguishes this case from any in which a speech ban might be narrowly tailored to protect privacy. This Court is unlikely to be presented any time soon with so suitable a vehicle for reviewing the vital interplay between privacy and the First Amendment.

This case also has enormous practical significance for Trans Union and other credit reporting agencies. Trans Union has been named as a defendant in a series of class actions brought under the FCRA, allegedly on behalf of every person in Trans Union's database – which includes some 190 million individuals, or virtually every adult in the United States.[7] Because the FCRA provides for statutory damages of between $100 and $1,000 for willful violations, *see* 15 U.S.C. § 1681n(a)(1)(A), in theory Trans Union's potential liability is some $190 *billion*. If the

[7] *See Martinelli v. Trans Union Corp.*, No. 99-1867 WHA (N.D. Cal.); *Winkelmann v. Trans Union LLC*, No. 8:99 cv 398 (D. Neb.); *Kearley v. Equifax, Inc.*, No. 00-D-225-N (M.D. Ala.); *Comstock v. Trans Union LLC*, No. CIV 00-0518 PHXMS (D. Ariz.); *Turner v. Trans Union Corp.*, No. 00-232-GPM (S.D. Ill.); *Woods v. Trans Union Corp.*, No. 00-256-WLB (S.D. Ill.); *Feige v. Trans Union Corp.*, Case No. 00-Civ-2621 (S.D.N.Y.); *Rozenblitt v. Trans Union Corp.*, No. 00-CV-1861 (E.D. Pa.); *Grogerty v. Trans Union Corp.*, No. 00-C-1665 (N.D. Ill.); *Payne v. Trans Union Corp.*, No. 00C 3292 (N.D. Ill.). These actions have been transferred to the United States District Court for the Northern District of Illinois pursuant to an August 2, 2000 Transfer Order of the Judicial Panel on Multidistrict Litigation.

D.C. Circuit's decision is given collateral estoppel effect in these class actions, as plaintiffs seek, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 (1979) (offensive collateral estoppel), Trans Union will not even have the opportunity to re-argue its First Amendment defense before it is faced with crushing liability.

The D.C. Circuit's opinion has already been followed by a district court adjudicating related issues under the Gramm-Leach-Bliley Act, *see* 15 U.S.C. § 6802(a), (b), which imposes privacy rules on financial institutions. *See Individual Reference Servs. Group, Inc. v. FTC*, 145 F. Supp. 2d 6, 40 (D.D.C. 2001), *appeal pending*, No. 01-5202 (D.C. Cir.) (applying the decision in this case to conclude that the disclosure of credit information is of "purely private concern" under *Dun & Bradstreet*). The need for this Court's review is plain.

B. THE D.C. CIRCUIT'S EXPANSION OF *DUN & BRADSTREET* TO CREATE A SUBJECTIVE CLASSIFICATION OF "PRIVATE" TRUTHFUL SPEECH SUBJECT TO DIMINISHED FIRST AMENDMENT PROTECTION CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

The D.C. Circuit's decision creates disturbing new First Amendment rules that conflict with decisions of this Court and with precedent in other circuits. On the basis of *Dun & Bradstreet*, the D.C. Circuit held that "Trans Union's target marketing lists comprise speech of purely private concern" and therefore do not trigger full First Amendment protection. Pet. App. 17a. The D.C. Circuit's holding warrants this Court's review because it conflicts with this Court's own decision in *Dun & Bradstreet* and would turn that case from a carefully limited exception into a First Amendment "black hole" that would swallow established principles of free speech jurisprudence.

The plurality opinion in *Dun & Bradstreet* concluded that a

false statement in a credit report on a private individual was not speech on a matter of "public concern," as that term is used in the specialized context of defamation law under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The report in *Dun & Bradstreet* of a single business bankruptcy "was made available to only five subscribers." 472 U.S. at 762. The plurality took great pains to stress that it was emphatically *rejecting* the view – erroneously embraced by the D.C. Circuit in this case – that its holding "leaves all credit reporting subject to reduced First Amendment protection." *Id.* at 762 n. 8. "We also do not hold * * * that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech." *Id.*

Dun & Bradstreet therefore provides absolutely *no* basis to conclude that the speech at issue here is subject to reduced protection under the First Amendment.[8] This Court has invoked *Dun & Bradstreet* only in the defamation context of litigation between private parties, one of whom is said to have injured another's reputation by publishing a falsehood. *See, e.g., Simon & Schuster, Inc. v. Members of New York Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 774 (1986). To compare a truthful and non-embarrassing list consisting of thousands (or more) of potential consumers culled and organized according to demographic or other selection criteria of interest to innumerable potential users of such lists,

[8] *See* Volokh, 52 STAN. L. REV. at 1096 (*Dun & Bradstreet* "says little about the propriety of applying the 'private concern' test to speech that, unlike false statements of fact, is presumptively constitutionally valuable. And *Dun & Bradstreet's* reasoning confirms that the lower protection given to private-concern speech flows precisely from the speech being false and thus presumptively unprotected."); Singleton, 11 FORDHAM I. P., MEDIA & ENT. L.J. at 140 ("Any special status for matters of 'public concern' or special exemptions for the press are likely to be increasingly incoherent in the age of the Internet, which is breaking these boundaries down.").

with an allegedly defamatory credit report concerning a single person, is truly to mix not just apples and oranges, but apples and apple orchards.

Nonetheless, based on *Dun & Bradstreet*, the D.C. Circuit created a new, bright-line rule that speech of purely "private concern" is not entitled to full First Amendment protection. Pet. App. 17a, 18a, 35a. Under the D.C. Circuit's decision, this rigid rule applies as a matter of definition, regardless of the kind of information involved or its impact on privacy. This Court has charted a different constitutional course with respect to restrictions on truthful speech in the name of privacy. It has eschewed a rigid rule and has instead engaged in a contextual balancing of privacy interests and First Amendment principles, twice holding that the First Amendment prevents a state from punishing the disclosure of a rape victim's name with civil damages. *See Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 488 (1975). This Court has ruled that a state may not, in the name of privacy, prohibit the press from publishing accounts of judicial misconduct commissions, *see Landmark Communications v. Virginia*, 435 U.S. 829, 837 (1978), or the names of juvenile offenders available in court records. *See Smith v. Daily Mail*, 443 U.S. 97,101-02 (1979). This Court has also invalidated attempts to protect the privacy of civil rights boycott violators by penalizing the disclosure of their names. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925-26 (1982).[9]

[9] This Court has also struck down privacy laws restricting the right of attorneys to send targeted solicitation letters to potential clients, *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 472-77 (1988), and preventing door-to-door solicitors from approaching households that have not affirmatively invited them. *Martin v. Struthers*, 319 U.S. 141, 147-48 (1943). This Court has overturned bans on the unsolicited mailing of contraceptive ads to private homes justified on grounds of privacy. *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 72 (1983). *See also Frisby v. Schultz*, 487 U.S. 474, 485-88 (1988) (balancing rights of privacy and expression).

In all of these cases, this Court has consistently rejected a bright-line rule that would elevate privacy over the First Amendment. In *Florida Star*, for example, this Court opined that it has preferred to resolve the conflict between privacy and free speech "only as it ar[i]se[s] in a discrete factual context." 491 U.S. at 530. *See id.* at 530 (citing Restatement (Second) of Torts § 652D (1977)); *see also Bartnicki v. Vopper*, 531 U.S. 990 (2001). The D.C. Circuit replaced this contextual balancing with a bright-line rule that it extracted from *Dun & Bradstreet*. Yet in *Florida Star* this Court implicitly rejected the D.C. Circuit's approach, expressly "contrast[ing]" the law governing privacy restrictions on truthful speech "with the well-mapped area of defamatory falsehoods," citing *Dun & Bradstreet*. 491 U.S. at 530 n.5.

There is no conceivable basis for transplanting the exception for defamatory "private speech" to other areas of First Amendment law. The *Dun & Bradstreet* exception has vexed the lower courts and attracted much criticism even in the defamation context.[10] One observer has identified "something of a consensus among the commentators that the difficulties in developing any principled approach to the public concern test

[10] Arlen W. Langvardt, *Public Concern Revisited: A New Role for an Old Doctrine in the Constitutional Law of Defamation*, 21 VAL. U. L. REV. 241, 266 (1987); Don Lewis, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767, 782 (1987); Andrew Jay McClury, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1082 (1995); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 668 (1990); Michael Greene, *Comment, Dun & Bradstreet v. Greenmoss: Cutting Away from the Protective Mantle of Gertz*, 37 HASTINGS L.J. 1171, 1194 (1986); David B. Katz, *Note, First Amendment – Defamation – Private Individual May Recover Presumed and Punitive Damages Without a Showing of Actual Malice*, 16 SETON HALL L. REV. 785, 806 (1986).

renders it essentially standardless."[11] Another survey of the progeny of *Dun & Bradstreet* in the lower courts has concluded that the courts' "efforts to locate a principled boundary between public and private concerns in defamation cases have not been encouraging. If not altogether devoid of content, the concept of speech addressing matters of public concern has proved sufficiently murky to give courts vast discretion in deciding whether to place a libelous statement in this category. . . . The fuzzy and mysterious line between public and private concerns thus 'appears to encourage ad hoc resolutions of the issue.' . . . These differences in classification seem to hinge more on judicial value judgments than on predictable adherence to the *Dun & Bradstreet* formula."[12]

The danger of exporting *Dun & Bradstreet* to other realms of First Amendment law is illustrated by another line of cases, not discussed by the D.C. Circuit, addressing the doctrine of "public concern" with respect to the free speech rights of government employees. *See, e.g., Connick v. Myers*, 461 U.S. 138, 146 (1983). Although extended to government contractors in *Board of County Comm'rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 685 (1996), the doctrine of *Connick v. Myers* has otherwise been limited to the context of public employees. "[I]t is one thing to decide what is a matter of public concern for the purpose of protecting a government employee from discharge – where the Court must tie in the type of speech engaged in to the effective functioning of the office – and quite another thing for the Court to engage in the much more open-ended task of trying to decide what is a 'matter of public concern' . . . ." 4 Ronald Rotunda &

[11] Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee*, 25 HASTINGS CONST. L.Q. 529, 551 n.114 (1998).

[12] Nat Stern, *Private Concerns of Private Plaintiffs: Revisiting a Problematic Defamation Category*, 65 MO. L. REV. 597, 609, 612, 614 (2000).

John Nowak, TREATISE ON CONSTITUTIONAL LAW § 20.35 (1992).

The D.C. Circuit's decision itself demonstrates the dangers involved. The court did not articulate any objective criteria for determining whether Trans Union's speech was of "private" or "public" concern. Instead, the D.C. Circuit proceeded by way of ipse dixit, not analysis. *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when see it."). The D.C. Circuit did not question any of the uncontradicted record evidence establishing that target marketing is of immense public importance – that millions of consumers make purchasing decisions based on target marketing; that a substantial portion of the U.S. economy is based on the availability of this information; and that the target marketing lists communicate information (such as mortgages) much of which is in the public domain. Even the FTC acknowledged that target marketing provides "substantial benefits for American consumers," Pet. App. 25a, and the FTC ALJ found that target marketing lists "serv[e] as a vital part of the process to 'inform the public of the availability, nature, and prices of products and services,' and perform[] 'an indispensable role in the allocation of resources in a free enterprise system.'" *Id.* at 66a (citations omitted). "Target marketing lists are as much a part of the process of speech as loudspeakers, *Saia v. New York*, 334 U.S. 558 (1948); public sidewalks, *United States v. Grace*, 461 U.S. 171 (1983); or free standing newsracks used to distribute free magazines, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)." *Id.* If the First Amendment's protections extend to such quotidian matters as entertainment, *Winters v. New York*, 333 U.S. 507, 510 (1948), reviews of stereo systems, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 498-501 (1984), and sophomoric parodies, *Hustler v. Falwell*, 485 U.S. 46, 55 (1988), they certainly cover the speech at issue here.[13]

[13] Federal Reserve Board Chairman Alan Greenspan has explained that "information on the characteristics of customers * * * has enabled producers and marketers to fine tune production schedules to the ever greater demands of our consuming public for diversity and individuality of products and services" and is "essential to the functioning of an advanced information based economy such as ours." Quoted in Fred H. Cate, *Principles of Internet Privacy*, 32 CONN. L. REV. 877, 883 (2000). Other commentators have observed that such information constitutes part of this nation's "essential infrastructure," the benefits of which are "so numerous and diverse that they impact virtually every facet of American life." Fred H. Cate & Richard J. Varn, THE PUBLIC RECORD: INFORMATION PRIVACY AND ACCESS – A NEW FRAMEWORK FOR FINDING THE BALANCE 10 (1999), available at <http://www.cspra.org/The%20Public%20Record.pdf>.

According to the D.C. Circuit, a speaker who does not directly communicate with consumers, but rather supplies raw informational material to others (such as a wire service that supplies news stories to media outlets), may find itself stripped of First Amendment rights. A newspaper might be prohibited from listing the names of persons who recently bought and sold houses in a particular area, or who recently worked for a particular employer. The D.C. Circuit's decision undermines the right to communicate not just information in credit card and mail order catalog databases but also names and addresses in per nal Rolodex files and e-mail address books. The potential effects of the decision below are as staggering as they are unanalyzed by the D.C. Circuit.

Moreover, the D.C. Circuit's decision conflicts with precedent in other circuits, which have properly limited *Dun & Bradstreet* to the special context of defamatory falsehoods.[14] In

[14] *See, e.g., Flamm v. American Assn. of University Women*, 201 F.3d 144, 147, 150 (2d Cir. 2000); *Wells v. Liddy*, 186 F.3d 505, 532 (4th Cir. 1999); *Levinsky's, Inc. v. Wal-Mart Stores*, 127 F.3d 122, 128 (1st Cir. 1997); *Lundell Mfg. Co. v. ABC, Inc.*, 98 F.3d 351, 363 (8th Cir. 1996); *Innes v. Howell Corp.*, 76 F.3d 702, 709 (6th Cir. 1996); *Jean v. Dugan*, 20 F.3d 255, 262 n.6 (7th Cir. 1994); *Snead v. Redland Aggregates*, 998 F.2d 1325, 1328, 1333 (5th Cir. 1993); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1056 (9th Cir. 1990); *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1087 (7th Cir. 1990); *U.S. Healthcare, Inc. v. Blue Cross of Greater Phila.*, 898 F.2d 914,

fact, the D.C. Circuit was unable to cite *any* case from *any other court* applying *Dun & Bradstreet* in the surprising manner pioneered by the court below.

A number of courts have squarely rejected the reasoning of the D.C. Circuit. In *Equifax Services, Inc. v. Cohen*, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981), for example, the court held that a statutory prohibition of use or disclosure of certain types of truthful information in credit reporting business was invalid because it "puts a direct content-based restraint on speech." *Id.* at 196. The court rejected the argument that the prohibition on speech could be sustained as a time, place, or manner regulation, because "[a] 'constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech.'" *Id.* at 197 (quoting *Consolidated Edison of New York v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980)).

In *U.D. Registry, Inc. v. State*, 40 Cal. Rptr.2d 228 (Cal. 2d Dist. 1995), *review denied*, 1995 Cal. LEXIS 5075 (Cal. 1995), *cert. denied*, 516 U.S. 1074 (1996), the court invalidated a statute that prohibited disclosure by a credit reporting agency of an unlawful detainer regarding a prospective tenant. The court held that credit reports are fully protected speech under the First Amendment rather than lesser-protected commercial speech: "The fact that [the credit reporting agency] sells the information does not transform it to commercial speech any more than the fact that a magazine or newspaper is sold makes its contents commercial speech. 'Some of our most valued forms of fully protected speech are uttered for a profit.'" *Id.* at 230. The court found *Dun & Bradstreet* inapplicable because the speech

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928 (3rd Cir. 1990); *Polson v. Davis*, 895 F.2d 705, 708 (10th Cir. 1990); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1195 (9th Cir. 1989); *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681, 686 (4th Cir. 1989); *Straw v. Chase Revel, Inc.*, 813 F.2d 356, 362 (11th Cir. 1987); *McDowell v. Paiewonsky*, 769 F.2d 942, 948 n.6 (3rd Cir. 1985).

involved was truthful rather than false. *Id.* at 230 n.1. "The view that credit reports involve a matter of only private concern is expressed in various ways in the plurality opinion in *Dun & Bradstreet*, a defamation case arising from an erroneous credit report of a bankruptcy filing. While the distinction may be significant in the area of defamation, it does not define the parameters of permissible regulation for truthful reporting." *Id.* at 232.

Yet, in the decision below, the D.C. Circuit held precisely the opposite. The conflict between the D.C. Circuit and the California courts does not exist simply "in the air." In *Joshua L. Frey, et al. v. Trans Union Corporation, Inc.*, Case No. 79 88 93 (Superior Court of the State of California, County of Orange), Trans Union is a defendant in a class action in California state court. That court will be bound by the California courts' rejection of *Dun & Bradstreet*, while the federal court class actions in which Trans Union is a defendant may follow the D.C. Circuit's decision below, as a matter of collateral estoppel or otherwise. *See* n. 7, supra. The disparity in treatment, and the consequent urgency of this Court's review, is palpable. *See also* Scott Shorr, *Note: Personal Information Contracts: How to Protect Privacy Without Violating The First Amendment*, 80 CORNELL L. REV. 1756, 1798-99 (1995) ("the circuit courts of appeal have yet to reach an agreement as to whether consumer credit reports constitute commercial speech or as to how much First Amendment protection they merit. . . . [There is] constitutional uncertainty about the status of credit reports.").

C. THE D.C. CIRCUIT'S HOLDING THAT INTERMEDIATE SCRUTINY MAY BE SATISFIED BY CONJECTURE ABOUT WHAT "CONGRESS APPARENTLY BELIEVES" CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

The D.C. Circuit held that the disparity in treatment between

credit and insurance prescreening and target marketing for all other purposes did not demonstrate a lack of narrow tailoring, even though prescreening entails a *greater* invasion of consumer privacy than does the target marketing banned by the FTC. The court held that "Congress *apparently believes* that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." Pet. App. 22a (emphasis added). The D.C. Circuit cited no evidence to support this conjecture. Nor did it offer any justification for the prescreening exception for offers of *insurance* as opposed to *credit*. The D.C. Circuit's reliance on Congress' "apparent[] belie[f]" is in effect the application of mere rationality review.

The court of appeals' speculation that Congress drew a finely hewn distinction between prescreening and other forms of target marketing is not only pure fiction, it is directly contrary to Congress' actual findings. In enacting the 1996 amendments to the FCRA, Congress acknowledged that the consumer data for credit and insurance prescreening was "more sensitive information" than "lists that are not based on credit limit, credit payment history, credit balance, or negative information." S. Rep. No. 104-185, at 36 (1995). Further, Congress opined that the opt out alternative would suffice for direct marketing as well as prescreening: "By opting out, consumers can prohibit consumer reporting agencies from releasing their names or other information about their reports for prescreening *and direct marketing*." *Id.* (emphasis added).[15]

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[15] Contrary to the D.C. Circuit's assertion, Pet. App. 21a, Congress did not reject an opt-out scheme for target marketing. In 1996, Congress considered an amendment to the FCRA allowing a credit reporting agency to disclose, for target marketing purposes, information which did not rise to the level of a consumer report. In Conference Committee, this provision was deleted from the final bill, but the legislative history reveals that Congress intended no inference to be drawn from the deletion. *See* 142 Cong. Rec. 11926 (Sept. 30, 1996) ("The deletion leaves the law silent on this issue retaining the status quo. The House action does not reflect any Congressional intent regarding the extent to which direct marketing is permissible under the FCRA") (Sen. Bryan). In any event, a congressional decision not to enact a particular measure is a " a particularly dangerous ground" for judicial interpretation. *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 121 S. Ct. 675, 681 (2001).

Nor did the FTC adduce any supportive evidence in the administrative record. The FTC never found that target marketing involved embarrassing or humiliating information. In fact, the FTC has characterized as "insignificant" and "modest" the potential privacy invasion from prescreening, 55 Fed. Reg. 18804 n. 14 (II, 4) (May 4, 1990), even though it may entail the disclosure of far more detailed credit performance information than other forms of target marketing.

In concluding that the internal inconsistency of the FTC's ban called for no evidentiary explanation under intermediate scrutiny, the D.C. Circuit placed itself in conflict with decisions of this Court holding that "exemptions and inconsistencies bring into question" whether a challenged law – even one restricting only commercial speech – directly and materially advances the asserted governmental interest. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 489 (1995). A restriction on speech is invalid under intermediate scrutiny when it "distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all." *Greater New Orleans Broadcasting Assn. v. United States*, 527 U.S. 173, 195 (1999).

The D.C. Circuit sought to avoid this First Amendment principle by speculating that "Congress apparently believe[d]" there was a relevant empirical distinction between the types of speech involved and between the corresponding consumer preferences. This ruling by the D.C. Circuit not only imputed to Congress a finding that was directly contrary to Congress' actual understanding, but also ventured a new form of intermediate

scrutiny that would substitute conjecture for concrete evidence and analysis. This Court has instructed that "a governmental body seeking to sustain a restriction [even] on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). That burden "is not satisfied by mere speculation and conjecture," *id.* at 770, or by "anecdotal evidence and educated guesses." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490 (1995). *See also Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404, 2425 (2001) (invalidating restriction on speech where the government did not 'carefully calculat[e] the costs and benefits associated with the burden on speech imposed' by the regulations," even though the government adduced numerous empirical studies and extensive market data to support its judgment) (internal quotation omitted); *Bartnicki*, 121 S. Ct. at 1764 n.18 ("mere speculation or conjecture" insufficient); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (no "findings of fact, or indeed any evidentiary support whatsoever"); *Ibanez v. Florida Dept. of Business & Prof'l Reg.*, 512 U.S. 136, 143 (1994) ("unsupported assertions" are "insufficient" to justify restrictions on speech).

In *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622 (1994), a plurality of this Court explained that, even when Congress makes "unusually detailed" factual findings that "are recited in the text of the Act itself," *id.* at 632, 646, in a First Amendment case a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrated that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666. The cable must-carry rules were adopted by Congress along with extensive factual findings made in the text of the statute itself. In addition, this Court noted that the factual development on remand had yielded "a record of tens of thousands of pages" of evidence. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 187

(1997) (*Turner II*) (internal quotation omitted). The Court stressed that there was a "substantial basis to support Congress' conclusion that a real threat [to over-the-air television] justified enactment of the must-carry provisions." *Id.* at 196. The Court pointed to "specific support" for Congress' conclusion (*id.* at 197): "substantive evidence" and "contemporaneous stud[ies]" regarding market structure and market power exercised by cable operators (*id.* at 202-03); and "[e]mpirical research in the record before Congress" (*id.* at 208). Nothing remotely comparable exists here.

The D.C. Circuit's decision also conflicts with *U S WEST, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999), *cert. denied*, 120 S. Ct. 2215 (2000), which invalidated a telecommunications privacy rule under intermediate First Amendment scrutiny and held that "the government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it." *Id.* at 1234-35.

The D.C. Circuit's holding is directly contrary. According to the D.C. Circuit, the government may carry its burden by simply asserting a "broad interest in privacy" and then tautologically imputing to Congress a fictional finding that the challenged restriction on speech, together with its oddly shaped exceptions, is warranted by unspecified facts that Congress must be assumed to have ascertained and weighed. This abjectly deferential, and indeed fail-safe, approach conflicts hopelessly with this Court's decisions and with lower court opinions properly interpreting them. *See, e.g., Bailey v. Morales*, 190 F.3d 320, 324 (5th Cir. 1999) (invalidating regulation of chiropractors' advertising,

which was based on "common sense" and anecdotal evidence); *Pearson v. Edgar*, 153 F.3d 397, 402 (7th Cir. 1998) (rejecting proposed governmental interest due to state's failure to proffer evidence to support it); *Harman v. City of New York*, 140 F.3d 111, 122 (2d Cir. 1998) (relying on *Turner I* to conclude that, under intermediate scrutiny, "the government cannot rely on assertions, but must show a basis in fact for its concerns").

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1141

TRANS UNION CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

February 6, 2001, Argued

April 13, 2001, Decided

On Petition for Review of an Order of the Federal Trade Commission

TATEL, Circuit Judge:

Petitioner, a consumer reporting agency, sells lists of names and addresses to target marketers--companies and organizations that contact consumers with offers of products and services. The Federal Trade Commission determined that these lists were "consumer reports" under the Fair Credit Reporting Act and thus could no longer be sold for target marketing purposes. Challenging this determination, petitioner argues that the Commission's decision is unsupported by substantial evidence and that the Act itself is unconstitutional. Because we find both arguments without merit, we deny the petition for review.

I

Petitioner Trans Union sells two types of products. First, as a credit reporting agency, it compiles credit reports about individual consumers from credit information it collects from banks, credit card companies, and other lenders. It then sells these credit reports to lenders, employers, and insurance

companies. Trans Union receives credit information from lenders in the form of "tradelines." A tradeline typically includes a customer's name, address, date of birth, telephone number, Social Security number, account type, opening date of account, credit limit, account status, and payment history. Trans Union receives 1.4 to 1.6 billion records per month. The company's credit database contains information on 190 million adults.

Trans Union's second set of products--those at issue in this case--are known as target marketing products. These consist of lists of names and addresses of individuals who meet specific criteria such as possession of an auto loan, a department store credit card, or two or more mortgages. Marketers purchase these lists, then contact the individuals by mail or telephone to offer them goods and services. To create its target marketing lists, Trans Union maintains a database known as MasterFile, a subset of its consumer credit data-base. MasterFile consists of information about every consumer in the company's credit database who has (A) at least two tradelines with activity during the previous six months, or (B) one tradeline with activity during the previous six months plus an address confirmed by an outside source. The company compiles target marketing lists by extracting from Master-File the names and addresses of individuals with characteristics chosen by list purchasers. For example, a department store might buy a list of all individuals in a particular area code who have both a mortgage and a credit card with a $ 10,000 limit. Although target marketing lists contain only names and addresses, purchasers know that every person on a list has the characteristics they requested because Trans Union uses those characteristics as criteria for culling individual files from its database. Purchasers also know that every individual on a target marketing list satisfies the criteria for inclusion in MasterFile.

The Fair Credit Reporting Act of 1970 ("FCRA"), 15 U.S.C. §§ 1681, 1681a-1681u, regulates consumer reporting agencies like Trans Union, imposing various obligations to protect the

privacy and accuracy of credit information. The Federal Trade Commission, acting pursuant to its authority to enforce the FCRA, *see* 15 U.S.C. § 1681s(a), determined that Trans Union's target marketing lists were "consumer reports" subject to the Act's limitations. The FCRA defines "consumer report" as:

> Any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--
>
> (A) credit or insurance to be used primarily for personal, family, or household purposes;
>
> (B) employment purposes; or
>
> (C) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d)(1). Finding that the information Trans Union sold was "collected in whole or in part by [Trans Union] with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the consumer's eligibility for one of the transactions set forth in the FCRA," and concluding that target marketing is not an authorized use of consumer reports under section 1681b, *In re Trans Union Corp.*, 118 F.T.C. 821, 891 (1994), the Commission ordered Trans Union to stop selling target marketing lists, *id.* at 895.

Trans Union petitioned for review. In *Trans Union Corp. v. FTC*, 317 U.S. App. D.C. 133, 81 F.3d 228 (D.C. Cir. 1996) ("*Trans Union I*"), we agreed with the Commission that selling consumer reports for target marketing violates the Act. 81 F.3d at 233-34. We nevertheless set aside the Commission's determination that Trans Union's target marketing lists amounted

to consumer reports. *Id.* at 231-33. The Commission, we held, failed to justify its finding that Trans Union's lists, by conveying the mere fact that consumers had a tradeline, were communicating information collected for the purpose of determining credit eligibility. We found that the Commission had failed to provide evidence to support the proposition that "the mere existence of a tradeline, as distinguished from payment history organized thereunder," was used for credit-granting decisions or was intended or expected to be used for such decisions. *Id.* at 233. (The parties' arguments in Trans Union I and in the proceedings on remand focused on the relevance of the information in the company's lists to consumer eligibility for credit; accordingly, the information's relevance to the other uses the statute lists--such as determining eligibility for insurance and employment--are not at issue in this case. *See In re Trans Union Corp.*, Opinion of the Commission, No. 9255, slip op. at 16 n.20 (Feb. 10, 2000) ("FTC Opinion").)

On remand, following extensive discovery, more than a month of trial proceedings, and an initial decision by an Administrative Law Judge, the Commission found that Trans Union's target marketing lists contain information that credit grantors use as factors in granting credit. Accordingly, the Commission concluded, the lists are "consumer reports" that Trans Union may not sell for target marketing purposes. FTC Opinion at 33. The Commission also rejected Trans Union's argument that such a restriction would violate its First Amendment rights. Applying intermediate scrutiny, the Commission found that the government has a substantial interest in protecting private credit information, that the FCRA directly advances that interest, and that the Act's restrictions on speech are narrowly tailored. *Id.* at 37-52. The Commission thus ordered Trans Union to "cease and desist from distributing or selling consumer reports, including those in the form of target marketing lists, to any person unless [the company] has reason to believe that such person intends to use the consumer report for purposes

authorized under Section [1681b] of the Fair Credit Reporting Act." *In re Trans Union Corp.*, Final Order, No. 9255 (Feb. 10, 2000). Trans Union again petitions for review.

II

As we pointed out in *Trans Union I*, the first element of the FCRA's definition of consumer report--"bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living," 15 U.S.C. § 1681a(d)(1)--"does not seem very demanding," for almost any information about consumers arguably bears on their personal characteristics or mode of living. *See* 81 F.3d at 231. Indeed, Trans Union does not challenge the Commission's conclusion that the information contained in its lists meets this prong of the definition of consumer report.

Whether the company's target marketing lists qualify as consumer reports thus turns on whether information they contain "is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for [credit]." 15 U.S.C. § 1681a(d)(1). According to the Commission, "a factor in establishing the consumer's eligibility for [credit]," *id.*, includes any type of information credit grantors use in their criteria for "prescreening" or in "credit scoring models." *See* FTC Opinion at 16-17. "Prescreening" involves selecting individuals for guaranteed offers of credit or insurance. *See id.* at 18; *see also Trans Union I*, 81 F.3d at 234 (defining "prescreening" as "the sale of a list of people preselected for credit worthiness by some specified criteria, where the buyer of the list agrees in advance to make a firm offer of credit to each listed person"). "Credit scoring models" are statistical models for predicting credit performance that are developed by observing the historical credit performance of a number of consumers and identifying the consumer characteristics that correlate with good and bad credit performance. *See* FTC Opinion at 17. Applying its

prescreening/credit scoring model standard, the Commission found that Trans Union's lists contain the type of information "'used' and/or 'expected to be used' ... as a factor in establishing a consumer's eligibility for credit." *Id.* at 15; *see also id.* n.19.

Trans Union urges us to reject the Commission's interpretation of the Act in order to avoid what the company calls "serious constitutional questions." Pet'r Opening Br. at 9. In support, it cites *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, where the Supreme Court refused to defer to the NLRB's interpretation of a provision of the NLRA because the Court believed it raised serious First Amendment problems. 485 U.S. 568, 574-77 (1988). But as we demonstrate in Section III, infra, Trans Union's constitutional arguments are without merit, so we have no basis for rejecting the Commission's statutory interpretation on that ground.

Nor has Trans Union offered a basis for questioning the Commission's statutory interpretation on other grounds. The company does not mention the Commission's interpretation of the statute in the "Issues Presented For Review" section of its brief. *Cf.* Fed. R. App. P. 28(a)(5) (requiring that appellants' and petitioners' briefs state the issues presented for review). Although scattered language in the brief hints at a statutory interpretation challenge, that language appears in a section entitled "The Record Does Not Support The Conclusion Reached By The Commission." Trans Union has thus failed to put the Commission on notice that it faced a nonconstitutional challenge to its interpretation of the statute.

We have the same reaction to the brief's occasional suggestions that the Commission's decision was arbitrary and capricious. Not only do these suggestions appear in a section entitled "The Commission's Interpretation Of FCRA Raises Serious Constitutional Questions," *see, e.g.*, Pet'r Opening Br. at 19 (referring to "illogical contradictions"), but the list of issues presented for review neither mentions the arbitrary and

capricious standard nor otherwise questions the reasonableness of the Commission's decision.

We thus turn to the one non-constitutional argument that Trans Union clearly mounts: that the Commission's decision is unsupported by substantial evidence. A footnote to the title of this portion of its brief states:

> The Order is replete with statements unsupported by the evidence.... The word limitation of [Federal Rule of Appellate Procedure] 32(a)(7) makes it impossible to address each such misstatement here. It is the responsibility of the Commission's counsel, however, to ensure that the Court is not misled by the statements in the Order not supported by the evidence.

Id. at 21 n.7. To bring a substantial evidence challenge, however, Trans Union must do more than assert generally that the decision is unsupported by substantial evidence. It must identify the specific findings it challenges and demonstrate that each finding is either unsupported by evidence or, because the Commission unreasonably discounted contrary evidence, unsupported by "the record in its entirety." *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The 14,000 words permitted by Rule 32(a)(7) are more than enough to accomplish this task.

Instead of challenging the Commission's findings regarding specific target marketing products, Trans Union points to evidence relating to the general question of whether the information in its target marketing lists is used to determine credit worthiness. This is not the question before us. As we indicate above, the Commission interprets "factor in establishing the consumer's eligibility for credit," 15 U.S.C. § 1681a(d)(1), to include any information considered by lenders in prescreening, which, as two witnesses testified, can involve consideration of criteria other than credit worthiness, *e.g.*, whether a given consumer is likely to respond to an offer of credit. Because Trans Union has not challenged the Commission's interpretation of the

statute, its argument that the information the company sells is not actually used to determine credit worthiness is beside the point. Moreover, Trans Union cites no testimony refuting the Commission's finding that the information in its target marketing lists is used in prescreening.

Not only has Trans Union thus failed to mount a proper substantial evidence challenge to the Commission's finding that lenders take list information into account in credit models and prescreening, but we have no doubt that the decision does find support in the record. Consider, for example, Trans Union's "Master File/Selects" product line, which allows marketers to request lists based on any of five categories of information: (1) credit limits (e.g., consumers with credit cards with credit limits over $ 10,000), (2) open dates of loans (e.g., consumers who took out loans in the last six months), (3) number of tradelines, (4) type of tradeline (e.g., auto loan or mortgage), and (5) existence of a tradeline. The Commission cites testimony and other record evidence that support its finding that lenders consider each of these five categories of information in prescreening or credit scoring models. Beginning with credit limits, the Commission cites the testimony of a statistician who builds credit scoring models. FTC Opinion at 19. That witness explained that scoring models rely in part on consumer utilization of credit, calculated by dividing a consumer's current outstanding balance by the consumer's credit limit. To support its finding regarding open dates of loans, the Commission relied on the testimony of a vice president of a company that builds credit scoring models. *Id.* According to that witness, some scoring models use the open date of the oldest tradeline in a consumer's credit file as a predictive characteristic. The witness also testified that some credit scoring models use the date of the most recently opened tradeline to determine credit risk. To support its finding that information about the number of tradelines in a consumer's credit file is a consumer report, the Commission cites the testimony of a vice president in charge of direct mail processing

for a bank's credit card department who explained that, in its credit making decisions, her bank considers the number of tradelines consumers possess. *Id.* at 20 n.30. The Commission also points to record evidence demonstrating that Trans Union itself uses the number of tradelines as a predictive characteristic in its credit scoring models. *Id.* at 20. As to the type of tradeline, the Commission cites the testimony of representatives of compa[illegible]s that design credit models who explained that some credit sc[illegible]ing models, including two used by Trans Union, take into accou[illegible]session of a bank card. FTC Opinion at 21-22. One witness testified that Trans Union scoring models also consider possession of a finance company loan to be a predictive characteristic. Another witness, this one representing a credit card company, testified that his company's scoring models assign points for possession of a mortgage, retail tradeline, or bank card. *Id.* at 21.

The record also contains sufficient evidence to support the Commission's resolution of the issue remanded by *Trans Union I*: whether mere existence of a tradeline is "a factor in credit-granting decisions." 81 F.3d at 233. An employee of a bank that issues credit cards testified that to be eligible for credit, an individual must have at least one tradeline. FTC Opinion at 25. The vice president of credit scoring at another credit card issuer testified that the very first question her company asks in prescreening is whether the consumer has a tradeline that has been open for at least a year. Challenging the implications of this testimony, Trans Union argues that banks ask whether consumers have tradelines not because the existence of a tradeline is itself a factor in determining credit eligibility, but because banks want to determine whether there is enough information in consumer files to make credit eligibility determinations. This may be true. But as we explain above, our task is limited to determining whether substantial record evidence supports the Commission's finding that banks consider the existence of a tradeline as a factor in prescreening or credit models. Because the record contains

such evidence, we have no basis for questioning the Commission's decision.

Trans Union has identified one potentially troubling inconsistency in the Commission's decision. As the company points out, record evidence demonstrates that lenders consider names and addresses when prescreening consumers for guaranteed offers of credit, yet the Commission does not prohibit the sale of names and addresses for target marketing purposes. Regarding addresses, the Commission's opinion says, "although some lenders will not extend credit to consumers with a P.O. Box address, we do not find that the P.O. Box feature bears on 'credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living.'" *Id.* at 31 n.50. It is not clear, however, why receiving mail at a post office should not be considered an aspect of an individual's "mode of living." We need not resolve this issue, however, because Trans Union presents neither an arbitrary and capricious nor a statutory interpretation challenge to the Commission's failure to prohibit the sale of names and addresses. *See* supra at 6-7.

Nor must we resolve any inconsistency between the Commission's decision in this case and a 1993 consent agreement between the Commission and a Trans Union competitor, TRW (now Experian). In contrast to the Commission's decision here, that agreement allowed TRW to sell information about consumers' ages to target marketers. Again, although this might suggest that the Commission has acted arbitrarily and capriciously in treating similarly situated entities differently, Trans Union has not made such a challenge. The Commission thus seems correct that "the TRW Consent is not before us in this matter and it is without precedential effect on this opinion." FTC Opinion at 16 n.22.

III

Trans Union's constitutional challenge consists of two

arguments. It claims first that the FCRA is vague, thus running afoul of the due process guarantee of the Fifth Amendment. Trans Union also argues that the statute violates the free speech guarantee of the First Amendment because it restricts its ability to disseminate information.

Beginning with the Fifth Amendment challenge, we are guided by *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). "Laws," the Court said, must not only "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited," but in order to prevent "arbitrary and discriminatory enforcement," they must also "provide explicit standards for those who apply them." *Id.* (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)). Emphasizing that these principles should not "be mechanically applied," the Court held that "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Id.* The "regulated enterprise," the Court added, "may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Id.* Finally, "the consequences of imprecision are qualitatively less severe" when laws have "scienter requirements" and "civil rather than criminal penalties." 455 U.S. at 499.

Applying this standard, we see no merit in Trans Union's vagueness argument. To begin with, because the FCRA's regulation of consumer reporting agencies is economic, it is subject to "a less strict vagueness test." *Id.* at 498. Moreover, Trans Union has "the ability to clarify the meaning of the [FCRA]," *id.*, through the Commission's advisory opinion procedures. *See* 16 C.F.R. §§ 1.1-1.4 (establishing general procedures for obtaining advisory opinions); *id.* § 2.41(d) (establishing procedures for obtaining guidance regarding compliance with FTC orders). Selectively quoting from the

Commission's regulations, the company disputes the usefulness of advisory opinions, suggesting that they can be changed at any time and that "the Commission expressly reserves the right upon rescission of an earlier opinion to commence an enforcement proceeding." Pet'r Reply Br. at 10. The relevant regulation states as follows (the sentences Trans Union omits are in italics):

> Any advice given by the Commission is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the action. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all the relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

16 C.F.R. § 1.3(b) (emphasis added). Although the next subsection of the regulation states that "advice rendered by the staff is without prejudice to the right of the Commission later to rescind the advice and, where appropriate, to commence an enforcement proceeding, " *id.* § 1.3(c), the portion of the regulation omitted by Trans Union makes quite clear that the company can safely rely on advisory opinions without fear of penalty should the Commission later change its mind.

The FCRA does not fit quite so comfortably under the other *Hoffman Estates* criteria. Although the Act does contain a clear scienter requirement for the imposition of civil fines, *see, e.g.*, 15 U.S.C. § 1681s(a)(2)(A) ("knowing"), it also provides that anyone who negligently violates the Act may be liable to injured consumers for actual damages. *Id.* § 1681o(a). The statute also

authorizes criminal penalties. *Id.* § 1681r (providing for possible imprisonment for "any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to a person not authorized to receive that information"). Even given these distinctions, however, because of the extremely clear process for "clarifying the meaning of the regulation," *Hoffman Estates*, 455 U.S. at 498, Trans Union simply does not face a due process risk of prosecution for conduct it could not have known to be illegal.

Trans Union's First Amendment challenge fares no better. Banning the sale of target marketing lists, the company says, amounts to a restriction on its speech subject to strict scrutiny. Again, Trans Union misunderstands our standard of review. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the Supreme Court held that a consumer reporting agency's credit report warranted reduced constitutional protection because it concerned "no public issue." *Id.* at 762. "The protection to be accorded a particular credit report," the Court explained, "depends on whether the report's 'content, form, and context' indicate that it concerns a public matter." *Id.* n.8. Like the credit report in *Dun & Bradstreet*, which the Supreme Court found "was speech solely in the interest of the speaker and its specific business audience," *id.* at 762, the information about individual consumers and their credit performance communicated by Trans Union target marketing lists is solely of interest to the company and its business customers and relates to no matter of public concern. Trans Union target marketing lists thus warrant "reduced constitutional protection." *Id.* n.8.

We turn then to the specifics of Trans Union's First Amendment argument. The company first claims that neither the FCRA nor the Commission's Order advances a substantial government interest. The "Congressional findings and statement of purpose" at the beginning of the FCRA state: "There is a need to insure that consumer reporting agencies exercise their grave

responsibilities with ... respect for the consumer's right to privacy." 15 U.S.C. § 1681(a)(4). Contrary to the company's assertions, we have no doubt that this interest--protecting the privacy of consumer credit information--is substantial.

Trans Union next argues that Congress should have chosen a "less burdensome alternative," i.e., allowing consumer reporting agencies to sell credit information as long as they notify consumers and give them the ability to "opt out." Pet'r Opening Br. at 43-44. Because the FCRA is not subject to strict First Amendment scrutiny, however, Congress had no obligation to choose the least restrictive means of accomplishing its goal.

Finally, Trans Union argues that the FCRA is underinclusive because it applies only to consumer reporting agencies and not to other companies that sell consumer information. But given consumer reporting agencies' unique "access to a broad range of continually-updated, detailed information about millions of consumers' personal credit histories," FTC Opinion at 1, we think it not at all inappropriate for Congress to have singled out consumer reporting agencies for regulation. As we explained in *Blount v. SEC*, "a regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective." 314 U.S. App. D.C. 52, 61 F.3d 938, 946 (D.C. Cir. 1995). The primary purpose of underinclusiveness analysis is to "ensure that the profferred state interest actually underlies the law, [so] a rule is struck for underinclusiveness only if it cannot fairly be said to advance any genuinely substantial governmental interest because it provides only ineffective or remote support for the asserted goals, or limited incremental support." *Id.* (internal citations omitted). To survive a First Amendment underinclusiveness challenge, therefore, "neither a perfect nor even the best available fit between means and ends is required." *Id.* The FCRA easily satisfies this standard.

Trans Union contends that the statute is underinclusive for

another reason, i.e., because it allows the sale of consumer reports for the purpose of guaranteed offers of credit or insurance. *Trans Union I* disposes of this argument:

> Being singled out for a firm offer of credit is exactly the sort of thing the Act seeks to promote, and a purpose for which it is quite reasonable to infer the consumer's implicit waiver or consent. Moreover, prescreening and the guaranteed offers of credit it spawns can only take place through the use of consumer reports, whereas the use of credit data for non-credit-related mailings is at most helpful to those ends.

81 F.3d at 234.

IV

Having considered and rejected Trans Union's other arguments, we deny the petition for review.

So Ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1141

TRANS UNION CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

October 23, 2001, Filed

On Petition for Rehearing

TATEL, Circuit Judge:

In its petition for rehearing, Trans Union argues that we incorrectly applied *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759-60 (1985), when we decided that target marketing lists merit only intermediate scrutiny. In *Dun & Bradstreet*, the Supreme Court held that a consumer reporting agency's wholly false credit report warranted only qualified constitutional protection because the report "concerned no public issue." *Id.* at 762. In reaching that conclusion, the Court noted that the report constituted "speech solely in the individual interest of the speaker and its specific business audience," and that the report reached only "five subscribers, who, under the terms of the subscription agreement, could not distribute it further." *Id.* The same is true here: Trans Union's target marketing lists interest only Trans Union and its target marketing customers, and Trans Union sells its lists for one-time use, prohibiting purchasers from disseminating the data.

To be sure, Trans Union's lists are not "wholly false," as was the Dun & Bradstreet credit report, nor is the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681, 1681a-1681u, an "incidental state regulation," as *Dun & Bradstreet* termed the

state defamation law challenged in that case. 472 U.S. at 762. Nothing in *Dun & Bradstreet*, however, suggests that these two factors were critical to the Court's decision. The important point is that here, as in *Dun & Bradstreet*, the targeted speech solely interests the speaker (Trans Union) and its "specific business audience" (its customers). *Id.*

One additional consideration, absent in *Dun & Bradstreet*, supports our conclusion that Trans Union's target marketing lists comprise speech of purely private concern. The lists contain names of private individuals, not incorporated businesses like the respondent in *Dun & Bradstreet*. We do not suggest that corporations lack privacy interests, nor that all corporate speech is somehow inherently public. But the particular information at issue in this case--people's names, addresses, and financial circumstances–is less public than the same information about companies whose articles of incorporation and financial statements are generally available for inspection. *Cf. Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975) ("By placing the information in the public domain ..., the State must be presumed to have concluded that the public interest was thereby being served.").

In support of its argument that the FCRA's target marketing limitation merits strict scrutiny, Trans Union cites cases in which the Supreme Court "struck down privacy-based restrictions on the publication of truthful information." Pet. at 5-6. Unlike this case, however, most of the cited cases involve speech on matters of public concern. *E.g., Bartnicki v. Vopper*, 121 S. Ct. 1753, 1765 (2001) (concluding that privacy concerns raised by disclosure of contents of private cellular telephone call "give way when balanced against the interest in publishing matters of public importance"); *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (holding that state may not punish publication of "'lawfully obtained truthful information about a matter of public significance'" (citing *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979))); *NAACP v. Claiborne Hardware Co.*, 458 U.S.

886, 913 (1982) (concluding that disclosure of names of civil rights boycott violators is "expression on public issues" and rests on "highest rung of the hierarchy of First Amendment values") (citations omitted); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839 (1978) (deciding that state may not punish press for disclosing confidential judicial proceedings, in part because a "responsible press has always been regarded as the handmaiden of effective judicial administration") (citations omitted); *Cox Broad. Corp.*, 420 U.S. at 491-92 (noting that "with respect to judicial proceedings ... the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice"). Another cited case involves speech addressed to a large, public audience. *Martin v. Struthers*, 319 U.S. 141, 146-47 (1943) (recognizing leafleting as central to public discourse because the "freedom to distribute information to every citizen ... is ... clearly vital to the preservation of a free society"). Finally, two cases concern commercial speech that--like the speech at issue here--merits only intermediate scrutiny. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (lawyer advertising); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (pamphlets about contraceptives). Trans Union's reliance on these last two cases is particularly misplaced, for they stand not for the principle that speech rights "prevail" over privacy rights "virtually without exception," Pet. at 5, but instead for the principle that speech of largely private concern may warrant only qualified protection.

Trans Union next argues that by permitting the sale of consumer reports to facilitate guaranteed offers of credit or insurance (prescreening), but prohibiting the sale of similar information to facilitate offers of other goods or services (target marketing), the FCRA makes a content-based distinction deserving strict scrutiny. The notion that content-based speech restrictions warrant strict scrutiny, however, derives from cases involving fully protected speech. *See, e.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (striking down

content-based sales tax on print media); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (striking down content-based law that forbade noncommercial educational broadcasting stations from editorializing). Trans Union's target marketing lists are private speech warranting only qualified constitutional protection. We need not now decide whether content-based restrictions of private speech might sometimes merit strict scrutiny. It is sufficient to note that given the Supreme Court's commercial speech doctrine, which creates a category of speech defined by content but afforded only qualified protection, the fact that a restriction is content-based cannot alone trigger strict scrutiny. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (applying intermediate scrutiny to determine constitutionality of Cincinnati rule banning handbill racks--but not newspaper racks--on public property).

In the alternative, Trans Union argues that the FCRA's target marketing restriction fails even intermediate scrutiny. Again, the cases the company cites are distinguishable. In *Edenfield v. Fane*, for example, the Supreme Court struck down a state rule prohibiting certified public accountants from personally soliciting new clients, partly because the state failed to establish that the rule would directly promote the state's interest in reducing fraud. 507 U.S. 761 (1993). Here, by contrast, the government cannot promote its interest (protection of personal financial data) except by regulating speech because the speech itself (dissemination of financial data) causes the very harm the government seeks to prevent. Thus, the FCRA unquestionably advances the identified state interest. For the same reason, unlike in *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, where the Court struck down a ban on casino advertising, in part because "practical and nonspeech-related forms of regulation ... could more directly and effectively" advance the government's interest in reducing casino gambling, 527 U.S. 173, 192 (1999), here there is no possibility that some less-restrictive

or nonspeech-related regulation could achieve the identified state interest. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (striking down prohibition on beer labels that identify alcohol content, in part because government interest in preventing brewers from competing on basis of alcohol content could be advanced through less-restrictive regulations); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1996) (invalidating Rhode Island's ban on advertising of retail prices of alcoholic beverages because "alternative forms of regulation that would not involve any restriction on speech ... would be more likely to achieve the State's goal of promoting temperance"). Finally, also unlike in *Greater New Orleans Broadcasting Ass'n*, where the challenged statute was "pierced by exemptions and inconsistencies," 527 U.S. at 190, here we confront a law with just one exception: the permissive standard applied to information sold for prescreening.

Nothing in *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404 (2001), issued after publication of our opinion, requires a different result. In that case, the Supreme Court struck down Massachusetts regulations governing advertising of various tobacco products, largely because the sheer breadth of the regulations raised questions about the fit between the regulations' means (restricting advertising) and ends (preventing underage tobacco use). *Id.* at 2425. *Lorillard* noted several ways in which the "breadth and scope of the regulations" evidenced that Massachusetts had not performed "a careful calculation of the speech interests involved." *Id.* For example, the regulations failed to target "advertising and promotion practices that appeal to youth," encompassing instead all forms of communication, and even restricting a retailer's ability to "answer inquiries [from adults] about its tobacco products." *Id.* at 2426. No similar problem exists here. Aiming directly at its intended target, supra at 4, the FCRA has neither indirect nor unintended effects on speech. The statute therefore sweeps only as broadly as necessary to accomplish its goal: protecting the privacy of personal

financial information. A narrower restriction would immediately lead to increased disclosure of such information. The FCRA's means and ends are thus one, leaving no possibility of a careless or imperfect "fit."

As for Trans Union's suggestion that Congress should have adopted an opt-out scheme, we note that Congress considered such a scheme, S. Rep. 104-185, at 36-38 (1995); H.R. Rep. 102-692, at 25-27 (1992), but settled on an opt-in scheme instead, 15 U.S.C. § 1681b(a)(2). As enacted, therefore, the statute permits Trans Union to sell a consumer's private information as long as the consumer consents. Although the opt-in scheme may limit more Trans Union speech than would the opt-out scheme the company prefers, intermediate scrutiny does not obligate courts to invalidate a "remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests." *Turner Broad. System, Inc. v. FCC*, 520 U.S. 180, 217-18 (1997) (citations omitted). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, ... [a] regulation [is] not ... invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 218.

Trans Union also argues that the FCRA's permissive treatment of information sold for prescreening "illustrates ... the [statute's] lack of narrow tailoring." Trans Union's Supp. Br. at 4. On the contrary, the statute's differential treatment of information sold for prescreening and that sold for target marketing recognizes that individuals' privacy interests in personal information are not absolute: Such interests are defined not only by the content of the information, but also by the identity of the audience and the use to which the information may be put. For example, people who fiercely protect the privacy of personal medical information may nevertheless disclose such information on job or medical insurance applications. People who protect the privacy of their salaries may nevertheless reveal

how much they make to qualify for a mortgage. So too, here. Congress apparently believes that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches. Given the nature of intermediate scrutiny, it can hardly be said that the First Amendment prohibits Congress from balancing privacy interests differently in these different circumstances--particularly since the FCRA's express purpose is to facilitate credit, not target marketing.

Nor does the FCRA's permissive treatment of information sold for prescreening demonstrate, as Trans Union argues, that the statute is unconstitutionally underinclusive. " '[A] regulation is not fatally underinclusive simply because an alternative regulation, which would restrict more speech or the speech of more people, could be more effective.' " *Trans Union v. FTC*, 245 F.3d 809, 819 (2001) (citing *Blount v. SEC*, 314 U.S. App. D.C. 52, 61 F.3d 938, 946 (D.C. Cir. 1995)). Underinclusiveness analysis "ensures that the proffered state interest actually underlies the law, [so] a rule is struck for underinclusiveness only if it cannot fairly be said to advance any genuinely substantial governmental interest." *Blount*, 61 F.3d at 946 (citations omitted). To survive a First Amendment underinclusiveness challenge, therefore, "neither a perfect nor even the best available fit between means and ends is required." *Id.* The FCRA satisfies this standard.

Finally, Trans Union argues that we erred by declining to consider its statutory interpretation and arbitrary and capricious claims. We explained, however, that Trans Union's briefs fell far short of this Circuit's requirements for presenting issues for decision. *Trans Union v. FTC*, 245 F.3d at 814. To be sure, the briefs attempted statutory claims, *id.* (discussing petitioner's briefs), and we had discretion to consider them. *Cf. Public Citizen Health Research Group v. FDA*, 337 U.S. App. D.C. 343, 185 F.3d 898, 903 n.* (D.C. Cir. 1999). But because of the utter incoherence of Trans Union's briefs, and because we discerned

no substantial constitutional issue, *cf. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 574-77 (1988) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."), we chose not to address those claims. Since Trans Union's petition for rehearing merely clarifies arguments the company's briefs had muddied, instead of restating arguments claimed to have been overlooked or misunderstood, the petition comes too late.

The petition for rehearing is denied.

So ordered.

On Petition for Review of an Order of the Federal Trade Commission

ORDER

Upon consideration of Petitioner's petition for rehearing filed May 25, 2001, and of the opposition thereto, it is

ORDERED that the petition be denied, as is more fully set forth in the opinion of the court filed herein this date.

Per Curiam.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1141

TRANS UNION CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

October 23, 2001, Filed

Before: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, and Garland, Circuit Judges.

ORDER

___Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per curiam.

APPENDIX D (RELEVANT EXCERPTS)

IN THE MATTER OF TRANS UNION CORPORATION

Docket No. 9255

Federal Trade Commission

FINAL ORDER

February 10, 2000

OPINION OF THE COMMISSION

By Thompson, Commissioner:

I. INTRODUCTION

In this information age, technological advances in information gathering and dissemination have generated substantial benefits for American consumers by providing them with, among other things, the strongest and most efficient credit markets in the world. In 1970, Congress recognized the importance of personal financial data to these markets when it enacted the Fair Credit Reporting Act ("FCRA" or "Act"). Congress expressly noted in the Act's findings and statement of purpose that the "banking system is dependent upon fair and accurate credit reporting" and acknowledged the "vital role" of credit bureaus (called "consumer reporting agencies" under the Act) "in assembling and evaluating consumer credit and other information on consumers." 15 U.S.C. § 1681(a)(1) and (3).

Under the U.S. credit reporting system, consumer reporting agencies (hereinafter "CRAs") collect consumer credit information from credit grantors and other sources, compile the information into credit reports, and then sell the reports to banks and other lenders, as well as to employers and insurance companies. Credit grantors have an incentive to provide data to CRAs because they benefit from the credit reporting system as

well. The effectiveness of this system depends upon a constant flow of consumers' credit information into large databases maintained by CRAs. It also depends on accuracy and timeliness. As a result, CRAs, unlike other data providers, have access to a broad range of continually-updated, detailed information about millions of consumers' personal credit histories. This information includes, for example, consumers' delinquencies and defaults, the types of credit accounts they have, when they obtained credit, and additional information that banks and other lenders often use in determining whether to extend credit.

Although Congress understood the importance of CRAs' access to such information regarding millions of consumers, it also recognized the importance of protecting consumers' financial privacy. In fact, legislative history reveals that one of the FCRA's principal goals was to protect the privacy of individuals whose sensitive credit and financial data are collected, used, reviewed and transmitted by CRAs.[1] Thus, in enacting the FCRA, Congress struck a balance between these competing interests. While Congress did not disturb the ability of CRAs to collect personal credit information, it did provide safeguards designed to protect the confidentiality of these data. Specifically, Section 604 of the FCRA limits the circumstances under which a CRA may disclose a "consumer report"[2] -- the statutory term for information commonly referred to as a credit report. For instance, Section 604 allows a CRA to furnish consumer reports to, inter alia, persons with certain "permissible

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[1] Report of the Committee on Banking and Currency, S. Rep. No. 91-517 (1969).

[2] Section 603(d) of the FCRA defines "consumer report" as: "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for . . . credit or insurance . . . [or] employment . . ." 15 U.S.C. § 1681a(d).

purposes." These permissible purposes include: (1) the extension of credit; (2) employment purposes; (3) underwriting of insurance; (4) determination of license eligibility; (5) risk assessment for an existing credit obligation; and (6) legitimate business need for the information. 15 U.S.C. § 1681b. Section 607 of the Act also requires CRAs to maintain reasonable procedures to ensure that they only furnish consumer reports for the purposes set forth in Section 604. See 15 U.S.C. § 1681e(a).

After careful consideration of the parties' arguments and thorough review of the substantial record in this case, the Commission concludes that Trans Union Corporation ("Trans Union"), a CRA, violates or has violated Sections 604 and 607 of the FCRA through the activities of its target marketing business.[3] In connection with its consumer reporting business, Trans Union receives various types of personal, credit information about consumers. Much of this information constitutes a "consumer report" as that term is defined by Section 603(d). Trans Union's sale of consumer reports to target marketers without a "permissible purpose" under the FCRA is a violation of the Act.

II. PROCEDURAL HISTORY

On December 15, 1992, the Commission filed an administrative complaint alleging, in pertinent part, that Trans Union violated Sections 604 and 607(a) of the FCRA by

> compiling, for sale to clients, lists of consumers, based in whole or in part on information contained in its consumer reporting database bearing on the characteristics enumerated in Section 603, thereby creating consumer reports, and providing such consumer reports in the form

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[3] As described infra, Trans Union may have discontinued some of the practices at issue in this matter. To the extent it continues to engage in certain other of the activities at issue, however, Trans Union's FCRA violations are ongoing.

> of target marketing lists to persons that do not intend to make a firm offer of credit to all those consumers on the list and who intend to use the information for purposes not authorized under [the FCRA].

In re Trans Union Corporation, 116 F.T.C. 1334, 1336 (1993).

On September 20, 1993, Administrative Law Judge ("ALJ") Parker entered a summary decision in favor of Complaint Counsel. The Commission upheld that decision, ruling specifically that Trans Union's target marketing lists were "consumer reports" because the minimum criteria for a consumer file appearing on any of the target marketing lists -- that the consumer had at least two open credit accounts -- satisfied the definition of "consumer report" under Section 603(d) of the Act. *In re Trans Union Corporation*, 118 F.T.C. 821, 869-70 (1994).

A key part of the Commission's determination was its finding that the mere existence of two credit accounts, or "tradelines,"[4] constituted information "collected in whole or in part by [Trans Union] with the expectation that it would be used by credit grantors for the purpose of serving as a factor in establishing the

[4] A "tradeline" is a segment of a consumer report that reflects a credit relationship between a consumer and a creditor -- usually a debt or a potential debt owed by the consumer to the credit grantor. An example of such an account relationship is a consumer's Visa, American Express or other credit card account. A typical consumer report contains multiple tradelines, and each reveals specific information about the account relationship, including: the account holder's account number, name, address, telephone number, date of birth, social security number, any generational suffix; the name and subscriber code of the credit grantor and its kind of business; the open date of the account; the verified date on the account; the type of loan; the credit limit assigned by the credit grantor; the payment patterns and history; the present status of the account; and the closed date of the account. Public record information such as bankruptcies, tax liens, foreclosures and civil judgments as well as collection accounts are also considered tradelines. See Stockdale 872, 875/23 -- 876/2, 888/5-24, 893/6-15, 894/4-12, 895/16 -- 896/1, 896/19-23, 897/13 -- 898/2; Botruff 2049/1-6; Weith 1844/18-22; Smith 3372/15 -- 3373/15.

consumer's eligibility [for credit]." *Id.* at 861. The Commission also held that target marketing is not a permissible purpose under the FCRA. Therefore, according to the Commission, Trans Union violated the FCRA by disclosing consumer reports to persons lacking any of the required permissible purposes.

In ruling on Trans Union's appeal of the Commission's decision, the United States Court of Appeals for the District of Columbia Circuit agreed that target marketing was not a permissible purpose under the Act. *Trans Union Corp. v. F.T.C.*, 81 F.3d 228 (D.C. Cir. 1996). The Court also held, however, that it was inappropriate for the Commission to use summary procedures to decide whether Trans Union's target marketing lists were consumer reports because the question presented a genuine issue of material fact. Consequently, the Court remanded the case to the Commission to resolve two primary questions. The first is factual – whether there is sufficient evidence to support the finding that Trans Union's target marketing lists are consumer reports. The second question is a legal one -- if we find that Trans Union's target marketing lists are consumer reports, does the FCRA pass constitutional muster?

On July 31, 1998, Administrative Law Judge James Timony issued an Initial Decision and Order on remand holding that Complaint Counsel provided sufficient evidence to show that Trans Union's lists are "consumer reports" under the Act and that Trans Union disclosed them to entities who lacked a permissible purpose. This disclosure violated Sections 604 and 607(a) of the FCRA. Judge Timony also held that the FCRA, as applied to Trans Union's practices, is constitutional. Trans Union appealed both rulings.[5]

[5] References to the record are abbreviated as follows, using the following hypothetical examples:

Initial Decision	ID at 200.
Initial Decision Finding	IDF-500.
Complaint Counsel Exhibit	CX-500.

After reviewing the full record in this case, including the extensive arguments of the parties, we adopt the ALJ's July 1998 findings and conclusions to the extent that they are consistent with those set forth in this opinion.

* * *

V. FCRA ANALYSIS: ARE TRANS UNION'S TARGET MARKETING LISTS "CONSUMER REPORTS" UNDER THE FCRA?

A. Introduction

As discussed above, Trans Union sells lists of consumer names and addresses to its target marketing customers. In creating these target marketing products, Trans Union applies various criteria to identify those consumers in its large database, CRONUS, who possess specific credit-related characteristics. The resulting lists thus communicate far more information to target marketers than simply names and addresses. A purchaser of a Trans Union target marketing list knows that every consumer included has at least one tradeline and possesses whatever additional characteristics the purchaser has specified.

A key question in this case is whether Trans Union's target marketing lists fall within the Act's definition of "consumer report." If they do, then Section 604 requires that Trans Union sell them only to entities who have a "permissible purpose" as defined by the Act. According to the court of appeals, target marketing is not a permissible purpose. *Trans Union*, 81 F.3d at

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Trans Union Exhibit	TU-500.
Trial Transcript testimony	Jones 1234/56-78.
Deposition Transcript testimony	Jones CX-100 at 123/45-46.
Trans Union's Appellant Brief	TUAB at 200.
Complaint Counsel's Answering Brief	CCAB at 200.
Trans Union's Reply Brief	TURB at 200.
Complaint Counsel's Proposed Findings	CCPF at 200.
Trans Union's Proposed Findings	TUPF at 200.

230. Thus, if Trans Union's lists are consumer reports then Trans Union has violated the FCRA by disseminating those lists for target marketing purposes.

Trans Union's target marketing lists qualify as consumer reports if they communicate information that: (1) bears on a consumer's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living" and (2) is "used or expected to be used or collected in whole or in part" to serve as a factor in determining credit eligibility. 15 U.S.C. § 1681a(d)(1) ("Section 603(d)"). Our determination of whether Trans Union's lists are consumer reports does not require a mere application of fact, but instead requires a close examination and interpretation of Section 603(d).[15]

The court of appeals determined that the tradeline information in Trans Union's lists meets the first prong of the consumer report definition -- i.e., it bears on one or more or the seven enumerated factors.[16] With respect to the second prong, however, the Court held there was insufficient evidence to support the Commission's 1994 finding and remanded the case back to the Commission, stating:

> On remand, if the FTC wishes to classify existence-of-tradeline[17] information as a consumer report,

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[15] We are mindful that, to the extent that Section 603(d) raises constitutional questions, we must construe the statute where fairly possible to eliminate such questions as long as such construction is not plainly contrary to Congress' intent. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

[16] "The first element does not seem very demanding, and we do not understand Trans Union to even contest the proposition that a person's having two tradelines 'bear[s]' on one or more of the seven enumerated factors." *Trans Union*, 81 F.3d at 231.

[17] "Existence of a tradeline" refers to the mere existence of tradeline information as determinative of whether the information disclosed is a consumer report under the FCRA. This term is distinct from the term "type of

> it must gather evidence that indicates that Trans Union intended the mere existence of a tradeline, as distinguished from payment history . . . to serve as a factor in credit-granting decisions, or, of course, that someone used or expected it to be used for that purpose. Evidence – lacking here -- that credit decisions could be made, even in part, on such "existence" information might be probative of Trans Union's intent. If under this standard, tradeline-existence information is found not to [be covered by the definition of consumer report], the FTC may of course embark on a similar inquiry about any individual list criterion to which it objects.

Trans Union, 81 F.3d at 233 (footnotes omitted) (emphasis added).

With this direction in mind, we have reviewed what is now a full record in this case and find that the existence-of-tradeline information, as well as other information Trans Union disclosed in its target marketing lists, meets the Section 603(d) definition of a consumer report. We therefore conclude that Trans Union violated the FCRA by selling consumer reports to target marketers who lacked a statutorily permissible purpose.

In reaching this conclusion, we examined Trans Union's various target marketing lists -- the Master File / Selects, proprietary models, and reverse append products -- and find that information disclosed through these products is the type of information that is "used" and/or "expected to be used" in whole or in part[18] for the purpose of serving as a factor in establishing

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tradeline" which refers to the character or type of information that is disclosed. See discussion infra pp. 20-26.

[18] Under Section 603(d), it is not necessary to show that the information communicated by the target marketing lists, standing alone, could be used to make a credit-related decision. We need merely determine that the information is used or expected to be used as "a factor" in such a decision. Trans Union,

a consumer's eligibility for credit.[19] Accordingly, these products are consumer reports and Trans Union cannot lawfully sell them for target marketing purposes.

We also analyzed the demographic information that Trans Union maintains in CRONUS and find that, based on the record before us, most of that information – including name, mother's maiden name, generational designator, address, zip code, telephone number, and social security number -- does not constitute a consumer report because there is no showing that it is used or expected to be used as a factor in determining credit eligibility.[20] We conclude, however, that Trans Union, as a CRA, cannot lawfully disclose age information to target marketers because the record in this case shows that lenders use age as a credit factor and age bears on credit capacity.[21] Accordingly, products that Trans Union creates by way of its consumer

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81 F.3d at 233. Something serves "as a factor" if it "'contributes to the production of a result.'" *United States v. Wilson*, 896 F.2d 856, 858 n.3 (4th Cir. 1990), citing Webster's 3rd International Dictionary, 1971.

[19] In 1995, the Commission took the position before the court of appeals that Trans Union's lists, based on the "existence of two tradelines" feature, were "collected for the purpose of" serving as a factor in credit eligibility decisions. The court of appeals rejected this argument on the grounds that the "'existence of a tradeline' seems not so much 'collected' by Trans Union as created by it for organizing the nuts-and-bolts payment data upon which credit decisions are made." *Trans Union*, 81 F.3d at 232. On remand, Complaint Counsel and Trans Union have focused their argument on the used and expected to be used elements of the definition.

[20] The Commission's argument before the court of appeals focused on the relevance of Trans Union's data to consumer's eligibility for credit, and not to insurance, employment, or other items set forth in Section 603(d). The court of appeals followed suit as did the parties following remand. Accordingly, we limit our analysis to credit eligibility.

[21] We also stress that, although the FCRA does not prohibit Trans Union from disclosing most demographic information, disclosure of such information may raise significant privacy concerns and may facilitate misuses including identity theft.

reporting business that are based upon, or contain, references to age are consumer reports under Section 603(d) and their disclosure for target marketing purposes violates Section 604 of the Act.[22]

* * *

VI. CONSTITUTIONAL ANALYSIS

Trans Union raises two constitutional defenses in this matter. Trans Union first asserts that, by barring it from selling target marketing lists, the FCRA violates the First Amendment of the United States Constitution. Second, Trans Union claims that the FCRA's definition of consumer report is unconstitutionally vague under the Fifth Amendment. We disagree with both arguments.

A. The FCRA Is a Constitutionally Permissible Restriction on Speech

The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech . . . ." The right to free speech, however, is not unfettered and it is well settled that different types of speech merit different levels of constitutional protection. Specifically, courts apply the highest degree of protection to speech related to issues of public concern such as political or social change or artistic or scientific expression. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (plurality opinion). Such fully protected speech may be called "pure" speech. *American Future Systems, Inc. v. Pennsylvania State Univ.*, 752 F.2d 854, 861 (3rd Cir. 1984). By contrast, courts apply a reduced or intermediate level of protection to "commercial" speech -- speech, such as advertising, that is related to a commercial transaction. *See, e.g.,*

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[22] As noted, the TRW Consent permits Experian to use age information from its consumer reporting business for target marketing purposes. The TRW Consent is not before us in this matter and it is without precedential effect to this opinion.

Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 561-63 (1980). Courts have also recognized that the First Amendment does not protect certain types of speech, such as obscenity and "fighting words," *Dun & Bradstreet*, 472 U.S. at 758-59, n.5, or conduct that does not constitute speech, *Michael Barnes, et al. v. Glen Theatre, Inc., et al.*, 501 U.S. 560, 570 (1991). For the reasons discussed below, we find that Trans Union's consumer reports are entitled to intermediate First Amendment protection. Accordingly, we analyze the FCRA under the standard established by the Supreme Court in *Central Hudson* and its progeny and conclude that the Act does not violate the First Amendment by prohibiting Trans Union from selling consumer reports to target marketers.

1. Type of Speech

In order to apply the appropriate First Amendment analysis to Trans Union's challenge to the FCRA, we must initially determine what type of expression or conduct the Act regulates in this case.

a. Pure Speech

Trans Union contends that its target marketing lists are pure speech and, as such, should receive the highest degree of constitutional protection. TUAB at 67-68. We are not persuaded, however, that Trans Union's lists rise to the level of such fully protected pure speech. The Supreme Court has held that speech on public issues deserves the highest degree of protection because the First Amendment "'was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Dun & Bradstreet*, 472 U.S. at 759, quoting *Roth v. United States*, 354 U.S. 476, 484 (1957). Speech related to matters of purely private concern, however, merits less First Amendment protection because regulation of such speech has less of an impact on the exchange of ideas on public issues. *Id.*

Here, the record clearly establishes that Trans Union's target marketing lists do not concern the types of lofty or important public issues or themes traditionally recognized as central to the First Amendment's guarantee of freedom of expression. *See, e.g., McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334 (1995) (distribution of anonymous political campaign literature); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (display of sign opposing Persian Gulf War); *United States v. Eichman*, 496 U.S. 310 (1990) (burning American flag); *Hustler Magazine, Inc. v. Fulwell*, 485 U.S. 46 (1988) (vulgar parody of public figure); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (allegedly libelous newspaper editorial advertisement about public official and civil rights movement); *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684 (1959) (exhibition of film depicting and expressing approval of adultery). Rather, the lists concern private information about individual consumers' credit history and other confidential, personal financial data. Because the lists do not possess the type of public component that compels full First Amendment protection, we conclude that Trans Union's lists are not pure speech and, consequently, we do not apply the strict scrutiny analysis to the FCRA's restriction on the dissemination of these lists.

b. Nonspeech

We also reject Complaint Counsel's position that the lists are not speech at all and thus fall outside the scope of First Amendment protection. Complaint Counsel argues that Trans Union's lists are not expression but, rather, are simply "commercial products" that Trans Union sells to its customers. CCAB at 58-61.[55] Although Trans Union's lists are products, we

[55] Of course, both Trans Union and Complaint Counsel also assert in the alternative that the target marketing lists are commercial speech and that we should therefore apply intermediate level scrutiny to the FCRA. We analyze commercial speech infra.

find that they do possess a quality of speech because they communicate substantial consumer information to Trans Union's target marketer customers. In other words, the lists Trans Union sells to its clients are more than simply a collection of names and addresses. Instead, these lists reflect Trans Union's complex analysis and qualitative judgment regarding which consumers meet various credit and financial-related criteria. Moreover, although courts have accorded them varying levels of protection, they have also treated consumer reports as speech.[56] Indeed, by questioning the application of the First Amendment here, the court of appeals in this case has necessarily assumed that a consumer report is some form of speech. *See Trans Union*, 81 F.3d at 235.

c. Commercial Speech

The ALJ held that Trans Union's lists constitute commercial speech and, as such, applied intermediate constitutional scrutiny to the FCRA. ID at 88-89. We find that, although the target marketing lists do not possess all the elements typically associated with commercial speech, the lists have sufficient commercial speech qualities (without rising to the level of fully protected pure speech) to warrant intermediate First Amendment Protection. Our conclusion is supported by the full record here as well as Supreme Court precedent.

The Supreme Court has defined the "core notion of commercial speech" as an expression that does no more than

[56] *See Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 762 (1985) (credit report "was speech solely in the individual interest of the speaker and its specific business audience"); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976) (treating consumer credit reports as commercial speech); *U.D. Registry, Inc. v. State*, 40 Cal.Rptr.2d 228, 233 (Cal. 1995) (much of the information contained in the credit reports is "highly protected noncommercial speech"); *Equifax v. Cohen*, 420 A.2d 189 (Me. 1980) (rejecting appeal of lower court determination that credit reports are commercial speech), *cert. denied*, 450 U.S. 916 (1981).

propose a commercial transaction. *Bolger v. Young Drug Products Corp.*, 463 U.S. 60, 66 (1983) citing *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 762 (1976). Recognizing that the line between commercial and other types of speech is not always distinct, the Court expanded upon the concept by identifying three factors relevant to the determination of whether speech is "commercial": (1) whether the speech is an advertisement; (2) whether it mentions a specific product by name; and (3) whether it is economically motivated. *Bolger*, 463 U.S. at 66-67.

Trans Union's lists do not fall neatly into this core notion of commercial speech as articulated by the Court in *Bolger*. The lists are not advertisements but instead are antecedent to advertisements -- i.e., the solicitations that Trans Union's target marketing customers send to the consumers identified in the target marketing lists. Trans Union's lists also do not mention a product by name; instead, as asserted by Complaint Counsel, they are the actual product. Finally, although Trans Union's marketing list business is certainly motivated by economic considerations, that fact alone does not confer commercial speech status. *See Bolger*, 463 U.S. at 67 (fact that party had an economic motivation for mailing pamphlets at issue was insufficient by itself to turn materials into commercial speech).

Still, *Bolger* does not establish a bright line test for commercial speech and the Supreme Court has also regarded "expression related solely to the economic interests of the speaker and its audience" as commercial speech. *Central Hudson*, 447 U.S. at 561. Similarly, Trans Union creates and sells its lists for its own economic benefit as well as the benefit of its target marketing customers. In other words, while the ultimate consumers who are the subject of Trans Union's lists have an interest in protecting their credit and financial privacy, Trans Union's sale of its target marketing lists is a commercial transaction motivated by the economic interests of the list seller and the list purchaser.

Moreover, in *Dun & Bradstreet*, which concerned a consumer report containing false information, a plurality of Justices found that the consumer report at issue deserved reduced First Amendment protection. The plurality opinion explained that speech related strictly to private concerns has less First Amendment value and merits less stringent protection than speech on matters of public concern. Thus, the level of protection the Court should give to a consumer report turned on whether the report concerned public or private matters. The plurality concluded that, based upon an examination of the content, form and context of the report, it involved "speech solely in the individual interest of the speaker and its specific business audience" and deserved reduced First Amendment protection. *Dun & Bradstreet*, 472 U.S. at 762 (plurality).[57]

Even though Trans Union's lists do not embody all of the characteristics of core commercial speech outlined by the Court in Bolger, the lists concern private matters primarily concerning the economic interests of the speaker and its specific business audience. As such, we find that the best fit here is to grant Trans Union's lists the same degree of First Amendment protection accorded to commercial speech.[58] Consequently, we apply

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[57] Although Trans Union correctly notes that *Dun & Bradstreet*, unlike the instant matter, concerned the distribution of a false credit report that injured the reputation of the report's subject, the falsity of the credit report was only one of the several considerations that led the Court to conclude that its distribution was not entitled to full First Amendment protection. The fact that the consumer report was of limited distribution and, like advertising, was hardy and unlikely to be deterred by incidental state regulation supported this conclusion. *Id.* at 762.

[58] Our conclusion is supported by a recent ruling of the U.S. Court of Appeals for the Ninth Circuit in which the court held that a private party's sale of the names and addresses of arrestees was a "pure economic transaction" that constituted commercial speech entitled to intermediate First Amendment protection. *United Reporting Pub. Corp. v. California Highway Patrol*, 146 F.3d 1133 (9th Cir. 1998), *rev'd on other grounds, Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 120 S. Ct. 483 (1999) (Court reversed facial

intermediate constitutional scrutiny to the FCRA's restriction of Trans Union's sale of its target marketing lists.[59]

2. The FCRA Passes Intermediate Constitutional Scrutiny

The *Central Hudson* case and its progeny set forth the analysis appropriate for intermediate level scrutiny in a First Amendment context. Under this test, a court must examine the following: (1) whether the expression at issue concerns lawful activity and is not misleading; (2) whether the asserted governmental interest supporting the restriction is substantial; (3) whether the regulation directly and materially advances the governmental interest asserted; and (4) whether the regulation is narrowly drawn to advance the government interest. *Central Hudson*, 447 U.S. at 566. Because it is undisputed that the expression at issue here concerns truthful, non-misleading factual information, we will focus our attention on the other three prongs of the *Central Hudson* test.

a. The Government Has a Substantial Interest in Protecting the Privacy of Consumers' Personal Credit Information

The FCRA and its legislative history indicate that the government's interest in restricting CRAs' dissemination of

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invalidation of the statute and did not reach the issue of whether the information constituted commercial speech); *see also Lanphere & Urbaniak v. State of Colorado*, 21 F.3d 1508, 1513 (10th Cir. 1994) (state statute restricting release, for commercial use, of criminal justice records containing personal information was subject to intermediate First Amendment scrutiny).

[59] Because the precise nature of Trans Union's lists was unclear, in an abundance of caution, the Commission formerly applied both the commercial speech and fully protected pure speech analysis when it first examined Trans Union's target marketing lists. *See In re: Trans Union*, 118 F.T.C. at 881-89. The Commission ruled that the FCRA did not violate the First Amendment under either standard. Our review of this matter is de novo and, based on our evaluation of a full record that was not previously before the Commission, we have determined that Trans Union's lists are not fully protected speech and thus we decline to apply strict constitutional scrutiny to the FCRA.

consumer reports is to protect consumers' privacy of their personal credit information. Congress expressly found that:

> "there is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a *respect for the consumer's right to privacy*."

15 U.S.C. § 1681(a)(4)(emphasis added). Congress based this finding on the record at the time of the Act's genesis, which demonstrated significant concerns in the area of consumer privacy. The record included, for instance, both media accounts as well as examples cited by Columbia University Professor Alan Westin regarding CRAs' disclosure of personal information for non-credit related purposes. (Reidenberg 961/22 -- 963/19).[60]

Senator Proxmire, in introducing the original legislation, stated that his bill "seeks to prevent an undue invasion of the individual's right to privacy in the collection and dissemination of credit information."[61] He also noted that "the consumer has . . . a right to see that the information is kept confidential and . . . he has a right to be free from unwarranted invasions of his personal privacy. The Fair Credit Reporting Act seeks to secure

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[60] During his testimony at Congressional hearings on the bill that became the FCRA, Professor Westin provided various examples of non-credit grantors easily obtaining consumer credit files. These examples include Professor Westin's own success in securing, without any credit-related purpose, a co-worker's consumer report as well as the ability of police agencies and federal investigators to obtain and use consumer reports in connection with non-credit related investigations. *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, pp. 92-93 (1969) (testimony of Alan Westin).

[61] Statement of Senator Proxmire, Committee on Banking and Currency, Subcommittee on Financial Institutions, S. REP. No. 91-517 (November 5, 1969). Further, "[a] fourth problem is that the information in a person's credit file is not always kept strictly confidential." S. REP. No. 91-517, at 4 (1969).

these rights."[62] In light of these concerns, Congress drafted the Act to limit CRAs' disclosure of credit reports to people with a "permissible purpose."

Congressional interest in protecting consumers' privacy is further illustrated by the 1996 amendments to the FCRA, in which Congress added to the permissible purposes of consumer reports prescreening for certain defined firm offers of credit and insurance. The Committee Report to the amendments notes an effort "to balance any privacy concerns created by prescreening with the benefit of a firm offer of credit or insurance for all consumers who meet the criteria for the credit or insurance being offered."[63] In striking this balance, however, Congress ensured significant privacy protections for consumers, requiring that they receive notice that their personal credit information is being used for such purposes, and that they have the right to "opt out" of such use. *See* 15 U.S.C. §§ 1681b(c), (e) and 1681m(d)(1). Trans

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[62] *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 2 (1969) (statement of Senator Proxmire). In addition to the interest in protecting the confidentiality and privacy of personal credit information, the FCRA's legislative history also makes clear the importance -- to consumers and CRAs alike -- of the free flow of accurate and reliable consumer credit information between consumers and credit grantors. The Committee Report cites the "vital role" of CRAs in our economy and states that credit grantors have the right to the facts necessary to make sound decisions on whether to grant credit. S. REP. No. 91-517, at 2 (1969). The report also stresses that consumers have the right to correct erroneous information in their credit files. *Id.* Professor Westin also referenced the importance of accurate credit information, stating that CRAs exist to help credit grantors avoid loss through fraud or misuse of credit and to keep the costs of such losses from falling on the average consumer. *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, p.91 (1969) (testimony of Alan Westin). Consumers benefit from strong credit markets, which in turn require accurate, current and reliable data.

[63] Economic Growth and Regulatory Paperwork Reduction Act of 1995 (12/14/95), S. REP. No. 104-185, at 36 (1995).

Union's practices at issue here do not provide for such safeguards.

Courts have also recognized that privacy protection of credit-related data is among the important purposes of the FCRA. The court of appeals in this matter found that "a major purpose of the Act is the privacy of a consumer's credit-related data." *Trans Union*, 81 F.3d at 234. *See also St. Paul Guardian Ins. Co. v. Johnson*, 884 F.2d 881, 884 (5th Cir. 1989); *Zamora v. Valley Fed. Sav. & Loan Ass'n*, 811 F.2d 1368, 1370 (10th Cir. 1987); *Heath v. Credit Bureau of Sheridan Inc.*, 618 F.2d 693, 696 (10th Cir. 1980).

Although enacted congressional policy does not necessarily constitute substantial governmental interest for purposes of the *Central Hudson* analysis, *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 119 S. Ct. 1923, 1932 (1999), we are satisfied that the interest here is sufficient. First, the FCRA's legislative history is consistent with other congressional enactments related to personal privacy and the concerns raised by compilations of personal information in large databases. In *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762-67 (1989), the Supreme Court reviewed in detail the terms and history of the Privacy Act, 5 U.S.C. § 552a, as well as the privacy exemptions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The Court recognized, for example, that "the Privacy Act was passed largely out of concern over 'the impact of computer data banks on individual privacy.'" *Id.* at 766 (quoting H.R. REP. No. 93-1416, at p. 7 (1974)). Additionally, the Court concluded that the essence of the "privacy" interest Congress sought to protect under the FOIA was the individual's "control of information concerning his or her person," by deciding for him or herself the "degree of dissemination" of personal information. *Id.* Such Congressional consistency supports our conclusion that the government's interest is substantial.

Furthermore, case law indicates well-settled privacy interests in personal information generally,[64] and financial and credit information in particular. *See, e.g., Barry v. City of New York*, 712 F.2d 1554, 1561 (2d Cir.) ("we recognize that public disclosure of financial information may be personally embarrassing and highly intrusive."), *cert. denied*, 464 U.S. 1017 (1983); *Millstone*, 528 F.2d at 833 (recognizing, in a FCRA case, that the right to privacy is "a significant personal right"). *But see U.S. West, Inc. v. Federal Communication Commission*, 182 F.3d 1224, 1228 (10th Cir. 1999) (vacating a Federal Communication Commission ("FCC") regulation on First Amendment grounds).[65]

. Trans Union argues that any privacy interest in the existence of a consumer's credit relationship is de minimis because only 1% of consumer files in CRONUS do not have a tradeline. TUAB 39 -- 40, 72. (Stockdale 906/1-8, 21-23, 904/15-18;

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[64] *See Edenfield v. Fane*, 507 U.S. 761, 769 (1993) (for purposes of *Central Hudson* analysis, state has substantial interest in protecting privacy of potential clients of certified public accountants); *Whalen v. Roe*, 429 U.S. 589, 599 (1976) (although the Supreme Court upheld a statute authorizing New York state to record names and addresses of consumers receiving prescriptions for certain drugs, the Court acknowledged that individuals have a protectable "interest in avoiding disclosure of personal matters").

[65] *U.S. West* involved review of an FCC regulation implementing a section of the Telecommunications Act of 1996. The petitioner argued that the regulation violated the First Amendment by restricting its ability to engage in commercial speech with its customers. A majority of the panel applied a *Central Hudson* analysis and expressed "reservations" about whether the FCC had "asserted a substantial state interest in protecting people from the disclosure of sensitive and potentially embarrassing personal information." *U.S. West*, 182 F.3d at 1235-36. The majority's skepticism was based upon its concern about the lack of evidence that carriers such as U.S. West would actually disclose the regulated information to outside parties and thereby breach consumers' privacy. The case before us is distinguishable from *U.S. West* as the facts here differ significantly. It is undisputed that Trans Union discloses consumer information to third party target marketers; indeed, the record demonstrates that Trans Union actively promotes the value of its lists to third party purchasers.

CX-358-G). This argument is not compelling. First, the mere fact that 99% of the consumer records in CRONUS have at least one tradeline is not indicative of whether there is a privacy interest worthy of FCRA protection.[66] Section 603(d) of the Act focuses on the nature of the information disclosed and not the amount of information worthy of protection. Second, Trans Union itself asserts that CRONUS data relate to a subset of people. The fact that this number is clearly less than the total number of adults in the United States, demonstrates just how effective tradeline information is in restricting to credit worthy individuals the pool of consumers eligible to be included in Trans Union's target marketing lists.

Also, we believe that Trans Union's argument ignores the full range of CRONUS information that Trans Union actually discloses or has disclosed about individuals. As discussed, Trans Union not only discloses information about the existence of a consumer's credit relationship, but also open dates, credit limits, number of tradelines, type of tradelines, among other information.

Finally, Trans Union asserts that consumers' routine disclosure of credit relationships, through the use of credit cards or mortgage applications that appear on the public record, demonstrates that consumers do not view credit relationships as private. TUAB at 73. The examples Trans Union cites, however, involve situations where the consumer knowingly relinquishes his or her privacy in return for a direct and known benefit that is also sought by the consumer. In those cases, the consumers were exercising their right to control the dissemination of their own personal information. *See Reporters Committee*, 489 U.S. at 763. By contrast, Trans Union's disclosure of consumers' personal credit information -- including the fact that a consumer has a

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[66] Moreover, as a practical matter, see supra p. 24, Trans Union's customers do not purchase lists of people with one tradeline.

recently used credit account that is not the subject of a credit dispute -- shares neither of these important attributes. In fact, such disclosures are made without the consumer's knowledge.

For all these reasons, we find that the government has a substantial interest in protecting the privacy of consumers' personal credit information, and we reject Trans Union's arguments to the contrary.

b. The Restriction Directly and Materially Advances the Government's Interest

The next question in the *Central Hudson* analysis is whether the FCRA's speech restriction directly and materially advances the government's interest. To meet this burden, the government may not rely on "mere speculation or conjecture" but must instead demonstrate that the restriction at issue will alleviate real harms to a "material degree." *Edenfield*, 507 U.S. at 770-71. The Supreme Court has struck down regulations of commercial speech where the government failed to offer sufficient evidence that the restriction at issue would advance its interests. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (no "findings of fact, or indeed any evidentiary support whatsoever"); *Edenfield*, 507 U.S. at 771 (no studies or anecdotal evidence presented); *see also Rubin*, 514 U.S. at 490 (1994) (government submits only "anecdotal evidence and educated guesses"); *cf. Edge Broadcasting*, 509 U.S. at 434 (upholding federal ban on lottery advertising based solely on "common sense judgment" that the ban would advance governmental interest in supporting the state's anti-gambling policies).

We rely upon substantial record evidence rather than mere conjecture or speculation to conclude that the FCRA, by limiting CRAs' disclosure of personal credit information, directly and materially advances the substantial government interest in protecting the privacy of personal credit information. Indeed, it is almost tautological -- because the unauthorized disclosure of personal credit information causes the privacy harm, restricting

the unauthorized disclosure of the information directly limits the infringement on privacy.

In attacking the FCRA, Trans Union argues that the statute is underinclusive because it elsewhere allows practices that undermine the consumer privacy interest in the information that Trans Union's target marketing lists communicate.[67] TUAB at 76-82. The court of appeals expressed an underinclusiveness concern as well, remarking on the apparent freedom of Trans Union's non-CRA competitors to gather and distribute the same information that Trans Union discloses in its marketing list business.[68]

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[67] Trans Union cites *United Reporting*, 146 F.3d at 1135, as an example of a statute struck down on First Amendment grounds. As noted, supra n.58, the Supreme Court recently reversed this decision. Furthermore, the FCRA is factually different. The statute at issue in *United Reporting* prohibited the release of arrest information for commercial purposes, but permitted it for "journalistic, scholarly, political, governmental, or investigative purposes." Prior to reversal, the Ninth Circuit had found that the governmental interest in protecting the privacy of arrestees was substantial but that the exceptions to the statute -- which include the right to broadly publish this information – precluded it from advancing the privacy interest in a direct and material way. Unlike the regulation at issue in *United Reporting*, however, in this case none of the FCRA's permissible purposes allows broad public disclosure of consumer report information.

[68] In particular, the court criticized the position that Trans Union could "separately obtain" and distribute consumer information – i.e., gather the information at issue from sources other than its credit reporting database – without violating the FCRA. Such a requirement, the court suggested, would result in a waste of time and resources. Although it did not rule on the issue, the court indicated that the "disparity" between Trans Union (as a CRA) and its competitors raised constitutional concerns. *Trans Union*, 81 F. 3d at 235. The court of appeals' concern presupposed that Trans Union, wholly independent of its status as a CRA, could gather for target marketing purposes the same type of rich consumer information that it gathers by way of its consumer reporting business. As explained infra, the record now before us clearly establishes that this is not the case; rather, the high quality and comprehensiveness of the underlying data in Trans Union's target marketing products stem from its special position as a CRA.

As a general rule, however, a regulation's underinclusiveness is fatal only where it is material, substantial or significant. *Bad Frog Brewery v. New York State Liquor Auth.*, 134 F.3d 87, 98-99 (2d Cir. 1998). The Supreme Court has offered the following guidance:

> "Nor do we require that the Government make progress on every front before it can make progress on any front . . . The Government may be said to advance its purpose by substantially reducing [the proscribed conduct], even where it is not wholly eradicated."

Edge Broadcasting, 509 U.S. at 434; *See also R.A.V.*, 505 U.S. at 387, *Moser v. F.C.C.*, 46 F.3d 970, 974 (9th Cir. 1995). Based on the full record developed on remand from the court of appeals, as well as the above-cited cases, we conclude that the FCRA's restrictions are not materially, substantially, or significantly underinclusive. Instead, we find that any disparity between Trans Union and its non-CRA competitors is reasonable given Trans Union's position as a CRA and the nature of the information it discloses in its target marketing products. In addition, neither the disclosure of information by credit grantors, nor the practice of prescreening, significantly undermines the Act's protection of privacy. Furthermore, the FCRA's restrictions on the dissemination of private, credit-related information are not, in fact, restricted to CRAs. Section 1681e(e) imposes restrictions on the resale by a CRA's customer of a credit report that are similar to the restrictions on the CRA itself. Therefore, the FCRA does substantially reduce the harm to consumers of intrusion on the privacy of their personal credit information.

(i) The FCRA Regulates the Activities of Trans Union and Other CRAs Because They Have Access to Vastly Superior Information

The fact that the FCRA applies to CRAs, but not to other target marketing or

data compilation companies, does not render the Act constitutionally infirm. As the record in this case demonstrates, CRAs are able to quickly obtain a broad array of current, accurate, detailed and highly personal credit information about consumers. Balancing this unique ability with safeguards against abuses, the FCRA requires that CRAs disclose such information only to persons with a permissible purpose as set forth in Section 604 of the Act. A comparison of Trans Union's operations to those of its non-CRA competitors demonstrates that Congress acted properly in treating CRAs differently than other information gatherers.

Trans Union's primary non-CRA competitors are Polk, Metromail, First Data, and ACXIOM. These companies obtain most of their data from state departments of motor vehicles ("DMVs"), census data, telephone directory white pages, county registrar and tax assessor records, self-reported surveys, and product registration or warranty cards. Polk, First Data, and Metromail's lists are compiled from two primary sources -- DMV data and white pages. (Cleary 3085/9-20, 3114/6-19; TU-119-3; Litz 2969/16 -- 2970/4; TU-115-p.158; Nusbaum 2880/8-12).

As a CRA, Trans Union's data sources are far superior and, as a result, the information it obtains through its credit reporting business has considerable advantages over the information of its non-CRA competitors. The quality of Trans Union's data is superior in terms of detail and accuracy as well as availability and comprehensiveness. Credit grantors and other information providers are responsible for providing CRAs with accurate, complete and up-to-date information and/or providing supplemental information to correct errors.[69] Because Trans Union obtains its information from third parties, its information is also less biased and thus more reliable than the self-reported information many non-CRA information brokers receive. Trans

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[69] Section 623 of the FCRA, 15 U.S.C. § 1681s-2.

Union's own credit scoring witness testified that data from CRAs are objective and better predictors of future credit performance than information provided by a consumer filling out an application. (Coffman 3806/2-14, 3857/24 -- 3858/4, 3858/17 – 3859/3; CX-122-P).[70] Finally, because Trans Union's information is reported and updated on an ongoing basis,[71] it is far more current than reports by for example, census bureaus and state DMVs.

By virtue of its status as a CRA, Trans Union also has the advantage of being able to provide an instant compilation of nearly all relevant information. Moreover, some of the more specialized information that Trans Union has access to and discloses in target marketing lists simply may not be available to other information brokers. Examples include the existence of 30/60/90 day finance trade; an upscale retail card; a student loan; a premium bank card; and the open dates of bank cards. (See e.g., TU-130-4; CCPF at 76; TU-117-2; TU-120-2; Schultea 3928/2-4; CX-310-D). Although other types of information that Trans Union discloses may be separately available from a range of sources, only CRAs have instant access to them all.

Recent legislation and case law have recognized and, indeed, expanded the disparity between Trans Union and its non-CRA competitors. As noted, Polk, Donnelly, and First Data use DMV data as a primary source of information and First Data also offers automobile data from state DMVs. However, the 1994 enactment of the Federal Drivers Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721, generally restricts state DMVs from disclosing,

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[70] Trans Union's competitors' modeled products are not as "predictive" as Trans Union's own CRONUS-derived products. (Hinman 2270/13 -- 2271/11).

[71] Trans Union receives information regarding 1.8 billion tradelines per month. (Stockdale 908/1-19). Some customers report information on a daily basis to TU; the majority report on a monthly basis or according to their billing cycles. (Stockdale 904/8-14; Frank CX-186 at 19/3-7).

without the licensee's permission, personal identifying information contained in state DMV records. Reversing the holding of the U.S. Court of Appeals for the Fourth Circuit, the Supreme Court in *Reno v. Condon*, 2000 WL 16317 (January 12, 2000), unanimously upheld the constitutionality of the DPPA. Thus, there is no question that the DPPA drastically limits the personal data that these information brokers can obtain.[72] n72 Moreover, the DPPA aside, information brokers have never been able to obtain driver data on a nationwide basis. By contrast, Trans Union's coverage provides continual access to current information on consumers' auto loans in all 50 states.[73]

Trans Union enjoys profound advantages with respect to other types of data as well. For instance, information brokers obtain consumer mortgage information from county records. (Litz 2972/6-9, 2975/5 -- 2976/7; M. Smith 3373/18-23, 3390/18 -- 3392/9; Nusbaum 2889/1-8, 2914/22 -- 2915/3, 2933/22 -- 2934/15; Cleary 3099/16-23; Hinman 2250/5-14). Such information gathering can be quite burdensome; in Texas alone, for example, information brokers may need to consult over 240 counties to fully cover the state's mortgages.[74] Trans Union has

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[72] The Court's holding in *Condon v. Reno*, that Congress may regulate the sale or release of personal identifying information, implicitly supports the notion that individuals have a right to personal data privacy. The same notion is presented here through our determination that the government, through the FCRA, has a substantial interest in protecting the privacy of consumers' personal credit information. See supra pp. 37-41.

[73] Trans Union understands its superiority as a source for consumer automobile data and has used this fact as a selling point. One of Trans Union's promotional letters notes that its coverage for automobile loan information encompasses all states and is not limited by the commercial restrictions that some states have imposed upon access to similar information. (CX-66-A).

[74] Mr. Kenneth Scott, witness for Trans Union, described the difficulty in obtaining such data, noting that information brokers send their employees with laptop computers to county courthouses to input public data and modem it to the front office. (Scott 2659/10-14).

the advantage of having national coverage of this information through its single database. This allows Trans Union to offer more current mortgage information than the public record information non-CRAs sell. It was therefore not surprising when Polk's Vice President for Operational Planning & Analysis conceded that Polk's consumer model assigns greater reliability weight to mortgage data coming from Trans Union, as compared to the data coming from county records. (Nusbaum 2888/2 -- 2890/13, 2927/6 -- 2928/11).[75]

Another source of information for Trans Union's non-CRA information broker competitors is from consumer surveys and warranty cards where consumers are obviously under no duty to provide accurate or complete information. As a CRA, however, Trans Union must "assure maximum possible accuracy" of all the information it gathers and disseminates. Section 607(b), 15 U.S.C. § 1681e(b). Trans Union has stated that self-reported data are "inevitably biased" (CX-115-Z-6) and has promoted its Master File as a unique source for individual-level observed behavior data -- "without equal" that is "based on actual behavior -- not self-reported or neighborhood values." (emphasis added) (CX-83-C).[76] Consumer surveys and warranty cards are also weak with respect to coverage. The record shows that 20-40 million consumers respond to surveys or provide warranty cards. (Nusbaum 2879/6-23; Cleary 3088/20 – 3089/6). By contrast, Trans Union provides information on over 140 million people. Additionally, several information brokers use census data to

[75] Even the legislative history reveals a concern that public information may not be as current as consumer reporting information. "Unfortunately, the [public record] information cannot always be kept up to date either because it is costly or because the correct information is simply not available." Report of the Committee on Banking and Currency, S. REP. 91-517, at 4 (1969).

[76] Elizabeth Dixon, Account Manager at Performance Data, and Patricia Porretto, Senior Account Executive at Performance Data, testified to the fact that the non-self-reported aspect of the Master File is a distinct advantage over other target marketers. (Dixon 292/16 -- 293/4; Porretto 1621/16-20).

estimate income. (CX-119-Z-7; Cleary 3123). These data are significantly less timely because they are only reported every ten years whereas Trans Union's income estimator, TIE, is updated every 7 days. (Wiermanski 1723/10-24; CX-120-B).

In light of the full record here, we find that Trans Union's status as a CRA allows it to collect a much wider array of consumer information that is richer, more detailed and more current than the information available to its non-CRA competitors. Trans Union could not obtain the same type and quality of information outside the scope of its consumer reporting business. Accordingly, we are not persuaded that the FCRA is unconstitutionally underinclusive because it treats CRAs and non-CRAs differently.[77]

Our conclusion is consistent with relevant case law. The Supreme Court has recognized the special threats to privacy that compilations of information pose, even though each constituent bit of information may be publicly available elsewhere. In *D.O.J. v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989), the court considered whether a privacy-related Freedom of Information Act exemption applied to a request for a "rap sheet" (a compiled database of publicly available information "bits"). The Court found:

> The issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there

[77] Trans Union also differs from other CRAs in terms of the type of information it discloses. Although Experian and Equifax disclose credit information to target marketers -- either directly or through third parties – they do so only on an aggregated, zip-plus-four basis. Such aggregated credit information relates to the typical consumer in a geographic area. By contrast, Trans Union's information concerns specific, identifiable individuals. Thus, it intrudes more acutely on individuals' privacy. In any event, the lawfulness of zip-plus-four aggregation is not an issue in this proceeding and we decline to rule on it here.

> is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

Id. at 764. The Court acknowledged the ". . . power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within."[78] *Id.* at 765.

(ii) Credit Grantors Do Not Disclose the Same Information As CRAs

To further support its underinclusiveness argument, Trans Union points to the "transactions or experiences" exception in Section 603(d)(2)(A)(i) and asserts that this provision undermines privacy protection under the Act because it allows credit grantors to disclose, for target marketing purposes, substantial information about their own customers.[79] We disagree. Trans Union introduced evidence demonstrating that Wachovia, First Card, Discover, First USA Bank, and American Express provide credit information on their credit card customers for target marketing. (Eulie 2376-78, 2381; Koppin 588-589;

[78] Trans Union argues that its witness, Kenneth Scott, testified that all of the selects available from Trans Union were also available from others in the marketplace. (Scott 2711 -- 2730). We are unpersuaded. In reaching his conclusion, we find that Mr. Scott performed only a superficial analysis. Mr. Scott examined only what is currently available - - not Trans Union's past practices. Importantly, Mr. Scott did not examine the difference in the source of the information for each select. Thus, he did not take into account that Trans Union, using CRONUS as its primary source of information, uniquely and instantly has a full range of richer and more comprehensive information available to it.

[79] Under this provision, information related solely "to transactions or experiences between the consumer and the person making the report" is not a consumer report. Section 603(d)(2)(A)(i) of the FCRA, 15 U.S.C. § 1681a.

Stormoen 3165-66; Scott 2614 -- 2622, 2628 -- 2630). The information available to a single credit grantor, however, is far more limited than Trans Union's CRONUS database, which compiles information from hundreds of creditors. Also, the record shows that credit grantors generally do not disclose particulars about credit accounts beyond the name and address of account holders. They do not, for example, disclose open dates or credit limits. (Pendleton 405/15-406/3; Koppin 588/6-589/6, 596/24-597/18; Stormoen 3165/3-3168/4; Eulie 2376/7-2377/23, 2380/4-10). Further, the ability of creditors and other merchants to collect customer information and disclose it may be limited by state law. New Jersey, Pennsylvania and Massachusetts, for example, prohibit merchants from collecting personal identification information that is not required for the transaction.[80] Other states prohibit the disclosure of information by merchants and financial institutions.[81] Because it is a CRA, Trans Union is not subject to these restrictions.

Trans Union also cites the National Marketing File ("NMF") created by Business Development Inc. - - a target marketing list provider - - as additional evidence that the FCRA's "credit grantor" exception can be used to intrude upon a consumer's financial privacy. This argument fails because NMF information is far less complete, detailed or timely than the data in

[80] See, N.J. STAT. ANN. § 56:11-17; PA. STAT. ANN. tit. 69, § 2602; MASS. ANN. LAWS ch. 93, § 105.

[81] California and Virginia prohibit credit card issuers and merchants respectively from selling personal information to third parties without notifying the individual and providing him/her with the ability to opt out; New Jersey prohibits the disclosure of electronic fund transfer transactions for marketing purposes without consent. See CAL. CIV. CODE § 1748.12; N.J. STAT. ANN. § 17:16K-3; VA. CODE ANN. § 59.1-442. Connecticut prohibits financial institutions from selling the names of card holders or disclosing financial records without written consent. See CONN. GEN. STAT. Ann. § 42-133gg; CONN. GEN. STAT. § 36a-42 (1997).

CRONUS.[82]

Similarly, the existence of cooperatives that share data and reveal consumer credit information also fails to support Trans Union's underinclusiveness argument. One such cooperative, Abacus, collects information regarding consumers' mail order buying behavior from 700 catalogers and shares the information among its members. Abacus discloses how many credit transactions a consumer has had over his/her lifetime, how much money a consumer has spent using credit cards over the last 12 months, and other information about a person's history of buying by credit card. (TU-206). Like NMF's information, however, this type of data also does not share the same level of comprehensiveness as the Trans Union information. Moreover, several of the state laws previously described may limit the disclosure of personal credit information to such cooperatives.[83]

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[82] The NMF discloses two types of information in two "fields": (1) a counter field that shows the number of credit cards a consumer has up to nine, and (2) a bank card field that indicates whether there is one bank card or not. (Schultea 3911/3-3913/7, 3943/6-23). The NMF is not kept current and a record is deleted only when the person moves or dies. (Schultea 3912/4-12, 3918/24 -- 3919/7, 3920/2-11). The NMF does not reveal whether the person has obtained or used credit within a specified time period; instead, it reveals only whether a consumer has ever had a bank card and how many, up to nine, accounts the consumer has ever had. Mr. Schultea, President of Business Development, testified that in all likelihood, the NMF contains references to credit card accounts that have been closed and/or are currently inactive. (Schultea 3922/3-14). The NMF also does not indicate open dates of any of the accounts, or the type of credit a consumer has obtained (other than the existence of a bank card). (TU-130 p. 4; TU-117 p. 2; TU-120 p. 2; Schultea 3928/2-4; CX-310-D). Finally, as for coverage, the information in the NMF comes from only 20-25 retail companies and bank clients with credit card customers. (Schultea 915/2-3916/21).

[83] We understand that substantial development of broad-based information-sharing agreements, in the presence of an ever-growing electronic information-handling medium, may advance the quality of information that such cooperatives offer. It is possible that over time, the disparity between CRAs and non-CRAs may narrow. If so, Congress may find it appropriate to

(iii) Prescreening

Finally, Trans Union argues that the FCRA is underinclusive because the Act, as amended in 1996, allows the practice of prescreening for so-called "firm offers" of credit and insurance. We find that Congress' decision to allow prescreening does not constitutionally undermine the FCRA. Any privacy intrusions that result from prescreening are significantly less harmful than the privacy intrusion at issue in Trans Union's target marketing business. In prescreening, the types of consumer report information that can be used are restricted - - Section 604(c)(2) - - and prescreening itself may provide a concrete benefit to consumers, i.e., a "firm offer of credit," that they might not otherwise have. Equally important is the FCRA's requirement that those seeking to use the prescreening mechanisms notify consumers that they may opt-out of future, prescreened solicitations. 15 U.S.C. §§ 1681b(c) and 1681m(d).

While a central concern of legislators at the time the FCRA was enacted was to protect the privacy of consumers' personal credit information, a related concern was to limit the disclosure of consumers' credit information. This latter concern and the means to address it were raised throughout the 1969 legislative hearings. Senator Proxmire, in introducing the original legislation, noted that "the consumer has . . . a right to see that the information [is] . . . used for the purposes for which it is collected . . ."[84] Professor Alan Westin also testified that "the

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respond to new threats to financial privacy with new legislation as they arise. Cf. Gramm-Leach-Bliley Act of 1999, Pub. L. 106-102 (limiting, inter alia, disclosure of nonpublic personal information to nonaffiliates). But that does not change the legal obligations the Act imposes upon CRAs like Trans Union as a result of their unique status and the benefits they receive. At this time, the range and detail of information provided by CRAs far surpasses that of other information brokers and supports the legislative scheme.

[84] Statement of Senator Proxmire, *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on*

central issue of privacy is the release of personal credit information to other than credit grantors."[85] Even a representative from the credit reporting industry testified that information gathered specifically for credit-granting purposes should not be made available for other purposes.[86]

Congress's approach to prescreening, in particular its requirement of notice and opt out rights for the consumer, is consistent with the twin goals of protecting the privacy of consumers' personal credit information and ensuring that consumer credit information not be used for inappropriate purposes. Permitting the disclosure of certain consumer credit information for prescreening, as tailored by statutory limitations, does not undermine the FCRA.

Consequently we find that the FCRA is not underinclusive. Congress recognized that CRAs like Trans Union, by virtue of their credit reporting business, are uniquely positioned to obtain the most up to date, detailed and comprehensive set of personal credit information on an individual, observed basis. Mishandling such information poses a special threat to consumer privacy. Therefore, by limiting the disclosure of this information, the FCRA directly and materially advances the government's interest

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Banking and Currency, 91st Cong. 92 (1969). He also stated that "[a] second aspect to the problem of confidentiality is the use of information inconsistent with the purposes indicated when the information was collected." 115 CONG. REC. S2340, 2410-16 (1969).

[85] *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 73-97, at 92 (1969) (testimony of Alan Westin).

[86] *Fair Credit Reporting: Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 91st Cong. 224, 228 (1969) (statement of Harry C. Jordan, Chairman of the Board, Credit Data Corp., "[Credit Data's] rules can be stated as follows: . . . Credit information is available to credit grantors only for credit purposes . . . Credit Data, as a matter of policy sells information only to credit grantors.").

in protecting the privacy of personal credit-related information. To find otherwise would allow Trans Union to have it both ways - - i.e., to enjoy unique access to the widest array of the best consumer credit information available, without following the restrictions Congress imposed in order to protect consumer privacy. Further, the fact that the FCRA allows credit grantors to disclose limited information and permits prescreening does not make the Act underinclusive.

c. The Restriction Is Narrowly Tailored

The final prong of the Central Hudson test requires a reasonable fit between the goals of the statute and the statute itself. The proper fit "is not necessarily perfect, but reasonable"; it must "represent[] not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989). With these words in mind, it is appropriate to consider whether there are alternative means of accomplishing the government's stated interest with a lesser intrusion into speech. In doing so, we recognize that a commercial speech restriction may be unconstitutional if there is a "far less restrictive" alternative. *Pearson v. Shalala*, 164 F.3d 650, 658 (D.C. Cir. 1999).

We believe that the FCRA's restriction on the disclosure of consumer reports, including Trans Union's target marketing lists, is narrowly tailored to protect the privacy of consumers' personal credit and other financial information. Moreover, we do not believe that alternative restrictions proposed by Trans Union are "far less restrictive," nor would they afford sufficient privacy protection.

Congress established a three-tiered system for disclosure and privacy protection:[87]

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[87] Congress has used a "tiered" privacy-protecting approach in other areas

* No Consumer Permission Required. Where a consumer has initiated a transaction involving credit, employment, or insurance, for example, CRAs may provide a consumer report for purposes of that specific transaction without the consumer's permission.

* Notice and Opt Out. Where a consumer has not initiated such a transaction, but where a creditor or insurance company seeks to make a "firm offer of credit or insurance" (i.e., prescreening), a CRA may provide certain consumer report information as long as the consumer is provided notice that his or her name was provided by a CRA and the opportunity to opt out of appearing on such lists in the future, i.e., notice and opt out rights.

* Opt In. Where a consumer has not initiated a transaction, and where the purpose of the credit report is not for a permissible purpose under the Act, a consumer report may only be disclosed with a consumer's express consent, i.e., an "opt in" system.

This three-tier scheme is sufficiently tailored to achieve Congress's goal. Congress's determination that consumers would not be adequately protected from privacy intrusions by target marketers through a "notice and opt out" system is reasonable. Specifically, Congress's decision to favor the more privacy protective "opt in" is a sound system in light of documented problems of credit reports being widely disclosed for purposes unrelated to credit.

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as well. In the Cable Communications Policy Act of 1984, 47 U.S.C. § 551, the Electronic Communications Privacy Act of 1986, 47 U.S.C. § 222(c), and the Video Privacy Protection Act of 1988, 18 U.S.C. § 2710, Congress afforded different levels of privacy protection – from disclosure without consumer's permission, to notice and opt out, to opt in – as the uses of such information become less related to the purposes for which the information was collected.

Trans Union contends that a simple opt out procedure would adequately protect consumer privacy without compromising Trans Union's speech. TUAB at 82-85. However, this proposal is untenable and is based upon a misstatement of the Equifax/Harris findings. According to Trans Union, the 1996 Equifax/Harris survey revealed that 80% of consumers surveyed who object to the use of credit reporting information, change their minds when they are told of the right to opt out. (TU-88; Beales 3656 -- 3665). Those survey findings, however, examined consumer attitudes about the use of credit reporting information to provide pre-approved offers of automobile insurance or life insurance. The survey did not examine consumer attitudes toward the use of such information for target marketing (at issue here).[88]

Additionally, to the extent that Trans Union contends that opt out rights alone would adequately protect consumers in the target marketing context, Trans Union ignores the fact that, in the prescreening context, Congress authorized a notice and opt out system. The notice segment of the system is essential because it provides consumers the information to allow them to exercise opt out rights.[89]

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[88] Survey evidence introduced by Complaint Counsel indicates that consumers view credit relationships as private and that they experience a privacy invasion from the disclosure of the existence of types of credit accounts. (See CX-274; Mazis 1109/20-25). The survey, conducted by Dr. Michael Mazis, assessed the attitudes of 1,002 consumers regarding the use of information derived from CRONUS and from credit reports to compile marketing lists. (Mazis 1080/10-18; CX-354-A; Waldeck 1060/12-16). A total of 68.1% of the respondents found the use of credit report information for the compilation of marketing lists to be unacceptable. (Mazis 1105/13-20; CX-354-B). Based on these results, Complaint Counsel's expert opined that consumers have a strong privacy interest in the use of information from their credit reports. (Mazis 1107/23-25).

[89] Indeed, although the Direct Marketing Association offers consumers the right to opt out of appearing on its members' marketing lists, most consumers are unaware that they can opt out of such lists. (Beales 3669/13 -- 3670/10;

Further, Trans Union argues that S. 650, 104th Cong. (1995) (a bill that was not enacted) could serve as a less restrictive alternative to the FCRA. (TU-214). Before a less restrictive alternative can be considered, however, it is necessary to determine whether the alternate approach furthers the government's interest to the same extent as the FCRA. Because S. 650 would have provided considerably less data privacy,[90] we cannot conclude that Congress acted unreasonably or disproportionately in the balance it struck between consumer privacy and commercial speech. Accordingly, the question of whether S. 650 would have had less of an impact on speech than the FCRA is irrelevant.

Based on this analysis, it is evident that the FCRA's restriction on Trans Union's target marketing lists is sufficiently narrowly tailored to achieve the goal of protecting the privacy of consumers' personal credit information. We therefore conclude that the provisions of the FCRA at issue here do not violate the First Amendment.

* * *

VII. CONCLUSION

Based on the foregoing, as well as the thorough and substantial record in this case, we find that Trans Union violated

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Westin 3639/8-19; TU-88-2-58). It is also significant that, when faced with a question at oral argument about whether Trans Union would agree to a notice and opt out system in the target marketing area, counsel for Trans Union evinced a strong reluctance to do so unless non-CRA competitors were similarly asked to abide by a notice and opt out system. (Oral Arg. 54/3-7). Trans Union's pursuit of equal treatment vis-a-vis non-CRA competitors is again based on its failure to recognize the special privacy concerns that CRAs' databases create.

[90] S. 650 would have permitted CRAs to sell target marketing lists that disclosed a wide variety of information, including information that is used in credit eligibility decisions and that bears on consumers' credit worthiness, such as number of tradelines, open dates of loans, and types of tradelines.

Sections 604 and 607(a) of the FCRA because its target marketing lists are "consumer reports" that were disclosed without a "permissible purpose." We also find that the FCRA, as applied in this case, passes constitutional muster.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent Trans Union Corporation from the Initial Decision and Order on remand, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to adopt the Administrative Law Judge's findings and conclusions to the extent that they are consistent with those set forth in the accompanying Opinion.

Accordingly, the Commission enters the following order:

IT IS HEREBY ORDERED that, consistent with the terms of this opinion, respondent Trans Union Corporation, and its successors and assigns:

a) Cease and desist from distributing or selling consumer reports, including those in the form of target marketing lists, to any person unless respondent has reason to believe that such person intends to use the consumer report for purposes authorized under Section 604 of the FCRA.

b) Maintain for at least five (5) years from the date of service of this Order and upon request make available to the Federal Trade Commission for inspection and copying, all records and documents necessary to demonstrate fully its compliance with this Order.

c) Deliver a copy of this Order to all present and future management officials having administrative, sales, advertising, or policy responsibilities with respect to the subject matter of this Order.

d) For the five (5) year period following the entry of this Order,

notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment, sale or change in control resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation that might affect compliance obligations arising out of this Order.

e) Within one hundred and eighty (180) days of service of this Order, deliver to the Commission a report, in writing, setting forth the manner and form in which it has complied with this Order as of that date.

APPENDIX E (RELEVANT EXCERPTS)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9255

In The Matter of Trans Union Corporation

INITIAL DECISION

July 31, 1998

James P. Timony, Administrative Law Judge

I. INTRODUCTION

The complaint, filed on December 15, 1992, alleges that Trans Union's sale of target marketing lists, with consumer information from its credit reporting files, was the sale of consumer reports to persons who did not have a permissible purpose to receive them, in violation of the FCRA, 15 U.S.C. § 1681.[1] Administrative Law Judge Parker entered summary decision on September 20, 1993, upholding the complaint.

Trans Union appealed to the Commission, which upheld Judge Parker on September 28, 1994.[2] On appeal, the United States Court of Appeals for the District of Columbia Circuit held that there was a genuine issue of material fact and that summary decision was inappropriate and remanded the case to the

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[1] 116 F.T.C. 1334 (1993). The original complaint in this matter also alleged violations of the FCRA by Respondent in connection with its prescreening activities. Those allegations were settled by consent agreement on November 18, 1993. *Id.* at 1357-61. Respondent's prescreening is not, therefore, at issue.

[2] 118 F.T.C. 821 at 838-95 (1994).

Commission. *Trans Union Corp. v. FTC*, 81 F.3d 228 (D.C. Cir. 1996).

By Commission Order of July 9, 1996, the matter was remanded for trial. I was assigned to preside on December 22, 1997. The trial commenced on February 17, 1998. The transcript is 3962 pages. About 500 exhibits were received. The record closed on March 27, 1998.[3]

* * *

Complaint counsel argue that PerformanceData lists are a product, not speech, and are not protected by the First Amendment. But the lists are part of commercial transactions, providing "information of import to significant issues" serving as a vital part of the process to "inform the public of the availability, nature, and prices of products and services," and performing "an indispensable role in the allocation of resources in a free enterprise system." *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

Target marketing lists are the means by which direct and telemarketers tell consumers about their business. Information on home sales and mortgages are found in these lists (Tr. 2657-59), as is information on automobile ownership, F 38, bank cards, F 44, department store cards, F 52, finance loans, F 55, mail order buyers, F 71, student loans, F 10, and upscale retail credit cards, F 74. Target marketing lists are as much a part of the process of speech as loudspeakers, *Saia v. New York*, 334 U.S. 558 (1948); public sidewalks, *United States v. Grace*, 461 U.S. 171 (1983); or free standing newsracks used to distribute free magazines, *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993). Target marketing lists involve information taken from the database gathered and used in the sale of credit reports. They

[3] Judge Parker ruled that the time limits required by recent amendment were impossible in this case. Order of September 30, 1996.

constitute commercial speech.[193]

* * *

[193] PerformanceData has provided a list to a wholesaler whose client was the National Republican Committee, which used the list to solicit consumers to make campaign contributions (CX 22; Tr. 308-09); the predominant use of the lists, however, is for commercial purposes. TU 171-73, TU 175; TU. 307-08, TU-315-19, TU-1317-21.

APPENDIX F (RELEVANT EXCERPTS)

15 U.S.C. § 1681a

(d) Consumer report.

(1) In general. The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for--

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 604.

(2) Exclusions. The term "consumer report" does not include--

(A) any--

(i) report containing information solely as to transactions or experiences between the consumer and the person making the report;

(ii) communication of that information among persons related by common ownership or affiliated by corporate control; or

(iii) communication of other information among persons related by common ownership or affiliated by corporate control, if it is clearly and conspicuously disclosed to the consumer that the information may be communicated among such persons and the

consumer is given the opportunity, before the time that the information is initially communicated, to direct that such information not be communicated among such persons;

(B) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device;

(C) any report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to such request, if the third party advises the consumer of the name and address of the person to whom the request was made, and such person makes the disclosures to the consumer required under section 615; or

(D) a communication described in subsection (o).

* * *

(f) The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

* * *

15 U.S.C. §1681b

§ 1681b. Permissible purposes of consumer reports

(a) In general. Subject to subsection (c), any consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a Federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe--

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) intends to use the information, as a potential investor or servicer, or current insurer, in connection with a valuation of, or an assessment of the credit or prepayment risks associated with, an existing credit obligation; or

(F) otherwise has a legitimate business need for the

information--

(i) in connection with a business transaction that is initiated by the consumer; or

(ii) to review an account to determine whether the consumer continues to meet the terms of the account.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that--

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 454 of the Social Security Act (42 U.S.C. 654) for use to set an initial or modified child support award.

(b) Conditions for furnishing and using consumer reports for employment purposes.

(1) Certification from user. A consumer reporting agency may

furnish a consumer report for employment purposes only if--

(A) the person who obtains such report from the agency certifies to the agency that--

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this title, as prescribed by the Federal Trade Commission under section 609(c)(3).

(2) Disclosure to consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless--

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other

similar means. If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application--

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 615(a)(3); and

(ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

(C) Scope. Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

(3) Conditions on use for adverse actions.

(A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report,

the person intending to take such adverse action shall provide to the consumer to whom the report relates--

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this title, as prescribed by the Federal Trade Commission under section 609(c)(3).

(B) Application by mail, telephone, computer, or other similar means.

(i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 615(a), within 3 business days of taking such action, an oral, written or electronic notification–

(I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;

(II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);

(III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific

reasons why the adverse action was taken; and

(IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

(ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under section 609(c)(3).

(C) Scope. Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if--

(i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and

(ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

* * *

(c) Furnishing reports in connection with credit or insurance transactions that are not initiated by the consumer.

(1) In general. A consumer reporting agency may furnish a consumer report relating to any consumer pursuant to subparagraph (A) or (C) of subsection (a)(3) in connection with any credit or insurance transaction that is not initiated by the consumer only if--

(A) the consumer authorizes the agency to provide such report to such person; or

(B)

(i) the transaction consists of a firm offer of credit or insurance;

(ii) the consumer reporting agency has complied with subsection (e); and

(iii) there is not in effect an election by the consumer, made in accordance with subsection (e), to have the consumer's name and address excluded from lists of names provided by the agency pursuant to this paragraph.

(2) Limits on information received under paragraph (1)(b). A person may receive pursuant to paragraph (1)(B) only--

(A) the name and address of a consumer;

(B) an identifier that is not unique to the consumer and that is used by the person solely for the purpose of verifying the identity of the consumer; and

(C) other information pertaining to a consumer that does not identify the relationship or experience of the consumer with respect to a particular creditor or other entity.

(3) Information regarding inquiries. Except as provided in section 609(a)(5), a consumer reporting agency shall not furnish

to any person a record of inquiries in connection with a credit or insurance transaction that is not initiated by a consumer.

(d) [Reserved]

(e) Election of consumer to be excluded from lists.

(1) In general. A consumer may elect to have the consumer's name and address excluded from any list provided by a consumer reporting agency under subsection (c)(1)(B) in connection with a credit or insurance transaction that is not initiated by the consumer by notifying the agency in accordance with paragraph (2) that the consumer does not consent to any use of a consumer report relating to the consumer in connection with any credit or insurance transaction that is not initiated by the consumer.

(2) Manner of notification. A consumer shall notify a consumer reporting agency under paragraph (1)--

(A) through the notification system maintained by the agency under paragraph (5); or

(B) by submitting to the agency a signed notice of election form issued by the agency for purposes of this subparagraph.

(3) Response of agency after notification through system. Upon receipt of notification of the election of a consumer under paragraph (1) through the notification system maintained by the agency under paragraph (5), a consumer reporting agency shall--

(A) inform the consumer that the election is effective only for the 2-year period following the election if the consumer does not submit to the agency a signed notice of election form issued by the agency for purposes of paragraph (2)(B); and

(B) provide to the consumer a notice of election form, if requested by the consumer, not later than 5 business days after receipt of the notification of the election through the system established under paragraph (5), in the case of a request made at the time the consumer provides notification through the system.

(4) Effectiveness of election. An election of a consumer under paragraph (1)--

(A) shall be effective with respect to a consumer reporting agency beginning 5 business days after the date on which the consumer notifies the agency in accordance with paragraph (2);

(B) shall be effective with respect to a consumer reporting agency--

(i) subject to subparagraph (C), during the 2-year period beginning 5 business days after the date on which the consumer notifies the agency of the election, in the case of an election for which a consumer notifies the agency only in accordance with paragraph (2)(A); or

(ii) until the consumer notifies the agency under subparagraph (C), in the case of an election for which a consumer notifies the agency in accordance with paragraph (2)(B);

(C) shall not be effective after the date on which the consumer notifies the agency, through the notification system established by the agency under paragraph (5), that the election is no longer effective; and

(D) shall be effective with respect to each affiliate of the agency.

* * *

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No. 01-1080

In the Supreme Court of the United States

TRANS UNION LLC, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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33pp

QUESTION PRESENTED

Whether the application of the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 *et seq.*, to a consumer reporting agency's sale of "target-marketing lists" for purposes not authorized by the FCRA violates the First Amendment.

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BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 245 F.3d 809. The court of appeals' opinion on rehearing (Pet. App. 16a-23a) is reported at 267 F.3d 1138. The decision of the Federal Trade Commission (FTC or Commission) is not yet reported, but is available at 2000 WL 257766. The decision of the administrative law judge (ALJ) is unreported.[1]

[1] Petitioner has reprinted excerpts of the FTC's decision at Pet. App. 25a-64a. The decision is reproduced at C.A. App. A0731-A0789, with additional material under seal reproduced at C.A. App. A3295-A3353. Petitioner has also reprinted excerpts of the decision of the ALJ at Pet. App. 65a-67a. The decision is reproduced at C.A. App. A0460-A0560, with additional material filed under seal reproduced at C.A. App. A3027-A3127. For the

A prior decision of the Federal Trade Commission in this case is reported at 118 F.T.C. 821. A prior opinion of the court of appeals, reversing that FTC decision and remanding for further proceedings, is reported at 81 F.3d 228.

JURISDICTION

The judgment of the court of appeals was entered on April 13, 2001. A petition for rehearing and rehearing en banc was denied on October 23, 2001. Pet. App. 24a. The petition for a writ of certiorari was filed on January 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Trans Union is a consumer reporting agency (sometimes referred to as a credit bureau). It maintains a database of detailed credit-related information (CRONUS) on almost every adult in the United States. That database includes information about each listed individual's employment, credit, and payment patterns. See C.A. App. A0738-A0743.

Petitioner uses the CRONUS database to generate consumer reports containing consumer credit information (sometimes referred to as credit reports), which it sells to subscribers. Petitioner has also used CRONUS to generate and sell "target-marketing lists" to entities that used those lists for solicitation purposes. Target-marketing lists themselves consist of only names and addresses of selected consumers, but because of the way in which they are generated, they effectively communicate much more information to the purchaser of

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convenience of the Court, we are lodging with the Clerk copies of the decisions of the FTC and ALJ, as reproduced in the public version of the appendix filed in the court of appeals.

the lists. Petitioner's list purchasers request target-marketing lists of individuals that meet various credit-related criteria in petitioner's database. Thus, when petitioner sells a particular target-marketing list to a list purchaser, it communicates to the list purchaser that every named consumer meets each of the criteria selected by the list purchaser—for example, that each listed consumer has at least one credit card with a credit line exceeding $10,000, or that each has a loan from a finance company, or that each has recently opened a line of credit. Some lists also provide information about consumers' individual income. Thus, the target-marketing lists effectively communicate information of the kind that is used by credit grantors in determining whether to advance credit to an individual. See C.A. App. A0468-A0494, A0750-A0767.

Petitioner has a highly advantageous position among list providers because, as a consumer reporting agency, it has access to extensive, detailed, and up-to-date credit information about consumers. See C.A. App. A0738. By contrast, petitioner's competitors in the target-marketing list business that are not consumer reporting agencies must rely on less comprehensive sources of information about consumers, such as public record information and self-reported information from consumers. See *id.* at A0745-A0747, A0777-A0780.

As a consumer reporting agency, petitioner is regulated by the Fair Credit Reporting Act (FCRA or Act), 15 U.S.C. 1681 *et seq.* Congress enacted the FCRA in 1970 to address two salient problems: consumer reporting agencies' failure to maintain accurate consumer credit information, and their failure to protect the confidentiality of information in consumers' files. 15 U.S.C. 1681; see *TRW, Inc.* v. *Andrews*, 122 S. Ct. 441, 444 (2001).

The FCRA addresses the first problem by requiring consumer reporting agencies to implement reasonable procedures to assure the accuracy of reports, and by allowing consumers to obtain copies of their reports and to dispute inaccurate information. 15 U.S.C. 1681e, 1681g, 1681i, 1681m (1994 & Supp. V 1999).

The FCRA addresses the second concern by restricting the dissemination of consumer reports to those who have a statutorily-defined permissible purpose for receiving such reports (or when the consumer affirmatively consents to disclosure). 15 U.S.C. 1681b(a) (Supp. V 1999). A credit grantor evaluating a consumer's application for credit has a permissible purpose for receiving a consumer report, as does an insurer considering an insurance application, and an employer evaluating an employment application.[2] See 15 U.S.C. 1681b(a)(3)(A)-(C) (Supp. V 1999). Another permissible purpose under the FCRA is "prescreening," the process whereby grantors of credit and insurance obtain (from a consumer reporting agency, such as petitioner) a list of consumers who meet certain criteria in order to make firm (but unsolicited) offers of credit or insurance to those consumers. 15 U.S.C. 1681b(c)(1)(B) (Supp. V 1999).

Target marketing, however—solicitation informed by the marketer's awareness of potential customers' individual credit characteristics—is not a permissible purpose under the FCRA. Indeed, petitioner's target-marketing business would allow its list purchasers to use the information on the lists for essentially unlimited

[2] The FCRA also authorizes consumer reporting agencies to disseminate reports in response to court orders, or in connection with the enforcement of child support awards. 15 U.S.C. 1681b(a)(1) and (4) (Supp. V 1999).

solicitation purposes, including sending consumers unsolicited catalogues, advertising, sweepstakes entries, and requests for donations.[3] Because these are not permissible purposes for consumer reports under the FCRA, a consumer reporting agency violates the FCRA if it sells a consumer report to someone who intends to use that report for target marketing, without the permission of each listed individual. A consumer reporting agency may, however, sell a consumer report for target marketing if each listed consumer affirmatively consents. 15 U.S.C. 1681b(a)(2) (Supp. V 1999).

2. In 1992, the FTC filed an administrative complaint against petitioner alleging that petitioner's target-marketing lists were "consumer report[s]," as that term is defined in the FCRA, 15 U.S.C. 1681a(d) (1994 & Supp. V 1999), and that petitioner violated the FCRA by selling those lists to businesses that lacked a

[3] The Commission's decision in this case gives examples of how petitioner's customers used the target-marketing lists. See C.A. App. A0742-A0743. One customer used the information from petitioner's lists "to advance its telemarketing promotion which offered homeowners who had been denied credit elsewhere the opportunity to reduce their monthly mortgage rates by refinancing their mortgage, thereby freeing up funds for 'home improvements,' a 'new car,' or a 'dream vacation.'" *Id.* at A0742. Petitioner observes (Pet. 2) that some of its customers purchased lists in order to solicit political or charitable donations from individuals with financial characteristics. Nothing in the record, however, establishes whether purchases of petitioner's lists for such political or charitable purposes constituted anything more than a minor portion of petitioner's target-marketing business. In any event, it is undisputed that petitioner's target-marketing business was not *limited* to providing consumer credit reports for political and charitable purposes, but rather provided those reports for an essentially unlimited range of uses, including (as the Commission made clear by its examples) purely commercial solicitation.

permissible purpose under the FCRA for receiving a consumer report. In 1994, the FTC entered an order against petitioner on a motion for summary decision. *In re Trans Union Corp.*, 118 F.T.C. 821. The FTC ruled that petitioner's target-marketing lists constituted a series of consumer reports regarding every listed consumer, and that petitioner's sale of those lists was not for a permissible purpose under the FCRA. *Id.* at 870, 878-879.

3. On petition for review, the court of appeals reversed and remanded to the FTC. *Trans Union Corp.* v. *FTC*, 81 F.3d 228 (D.C. Cir. 1996). Although the court agreed with the FTC that target marketers do not have a permissible purpose for receiving consumer reports, see *id.* at 234, it was unable to conclude on the record before it that petitioner's target-marketing lists constituted consumer reports. In particular, the court found a genuine issue of fact as to whether target-marketing lists communicate information of the kind used by creditors as a factor in making decisions to grant credit, one of the three elements of the FCRA's statutory definition of "consumer report." See *id.* at 231-233; 15 U.S.C. 1681a(d) (1994 & Supp. V 1999). The court ruled that, if the FTC wished to pursue the matter, it would have to develop a record sufficient to establish the final element of the definition. See 81 F.3d at 233.

4. On remand, a trial was held before an ALJ, at which evidence was presented showing that petitioner's target-marketing lists communicate information of the kind used by credit grantors to determine whether individuals should be advanced credit. Based on that evidence, the ALJ concluded that petitioner's target-marketing lists are "consumer reports" under the FCRA, and that petitioner's sale of those lists for

target-marketing purposes violates the Act. C.A. App. A0558-A0559. The ALJ ordered petitioner to cease and desist distributing consumer reports in the form of target-marketing lists unless petitioner has reason to believe that the recipient of the list will use the list for a statutorily authorized purpose. *Id.* at A0560.

The Commission substantially adopted the ALJ's decision and order. C.A. App. A0731-A0789. The Commission upheld the ALJ's central factual determination, based on the evidence at trial, that target-marketing lists contain information of the kind used by creditors to decide whether to advance credit to individuals. *Id.* at A0767. The Commission noted that, in fact, "the record shows that [petitioner] *expected* its credit grantor customers to *use* the information as factors in such determinations." *Id.* at A0752.

Addressing petitioner's constitutional arguments, the Commission acknowledged that consumer reports "do possess a quality of speech," C.A. App. A0769, but it emphasized that target-marketing lists "concern private information about individual consumers' credit history and other confidential, personal financial data," *id.* at A0768-A0769. The Commission also likened the reports to commercial speech because, although the reports are not themselves advertisements, they are "antecedent to advertisements—*i.e.*, the solicitations that [petitioner's] target marketing customers send to the consumers identified in the target marketing lists." *Id.* at A0770. The Commission upheld that application of the FCRA to target-marketing lists under intermediate scrutiny because, it concluded, the government has a substantial interest in protecting the privacy of individuals' personal financial information communicated by the reports, see *id.* at A0771-A0775, unauthorized disclosure itself causes the harm to the important,

statutorily protected privacy interest, see *id.* at A0775-A0776, and Congress's decision to require affirmative consumer consent rather than an "opt-out" system to protect privacy was reasonable, see *id.* at A0785-A0786.

5. Trans Union again petitioned for review, and the court of appeals affirmed. Pet. App. 1a-15a. Based on the record compiled before the FTC, the court sustained the Commission's determination that target-marketing lists are "consumer reports" under the FCRA because they contain information of the kind used as a factor in establishing the consumer's eligibility for credit, and thus also upheld the FTC's conclusion that the dissemination of such lists for purposes other than those allowed under the statute violates the FCRA. See *id.* at 7a-10a.

The court also rejected petitioner's contention that the application of the FCRA to target-marketing lists violates the First Amendment. Pet. App. 13a-15a. Drawing an analogy to the credit report at issue in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), which received only "reduced constitutional protection" because it addressed "no public issue," Pet. App. 13a, the court applied an intermediate level of constitutional scrutiny to the application of the FCRA to petitioner's target-marketing lists. The court ruled that the interest furthered by the FCRA, protecting the privacy of consumer credit information, is substantial, see *id.* at 13a-14a, that Congress was not obliged to choose the least restrictive means to further that interest (such as an "opt-out" mechanism), *id.* at 14a, and that the FCRA is not underinclusive, *id.* at 14a-15a.

6. On petition for rehearing, the court of appeals reaffirmed its ruling that the application of the FCRA

to target-marketing lists is constitutional. Pet. App. 16a-23a.

The court again found support for its application of intermediate scrutiny in *Dun & Bradstreet*. The court observed that the lists at issue in this case, like those in *Dun & Bradstreet*, "interest only [petitioner] and its target marketing customers," and that petitioner restricted the purchasers of its target-marketing lists from disseminating the data on those lists further, just as Dun & Bradstreet restricted its subscribers from further disseminating the credit reports at issue in that case. See Pet. App. 16a-17a. The court also noted that, whereas *Dun & Bradstreet* concerned financial information about corporations, which often make their financial statements available for public inspection, target-marketing lists contain nonpublic information about individuals' financial circumstances. *Id.* at 17a. The court found this case to be unlike cases in which this Court has struck down restrictions on the publication of truthful information, for those cases all involved "speech on matters of public concern." *Ibid.* And it rejected petitioner's argument that the FCRA makes a content-based distinction requiring strict scrutiny, noting that the commercial speech doctrine itself "creates a category of speech defined by content but afforded only qualified protection." *Id.* at 19a.

The court also reaffirmed its conclusion that the FCRA satisfies intermediate scrutiny. As the court observed, given that the substantial interest protected by the FCRA is the individual's interest in maintaining the privacy of personal financial information, "the government cannot promote its interest * * * except by regulating speech because the speech itself (dissemination of financial data) causes the very harm the government seeks to prevent." Pet. App. 19a. "[H]ere,"

the court observed, "there is no possibility that some less-restrictive or nonspeech-related regulation could achieve the identified state interest." *Id.* at 19a-20a. Nor, the court reiterated, is the FCRA underinclusive merely because it permits similar information to be disseminated to entities that intend to make firm offers of credit and insurance to consumers. The court noted that individuals often fiercely protect the privacy of information in some circumstances but willingly provide the same information in other circumstances, and that Congress may well have concluded that individuals "are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." *Id.* at 21a-22a. That permissible use of consumer reports is also justified, the court explained, because "the FCRA's express purpose is to facilitate credit." *Id.* at 22a. Finally, the court concluded, under intermediate scrutiny "neither a perfect nor even the best available fit between means and ends is required." *Ibid.*

ARGUMENT

The decision of the court of appeals, upholding the constitutionality of the application of the FCRA to the sale of target-marketing lists, does not conflict with any decision of this Court or any other court of appeals. The court's decision to apply a reduced level of First Amendment scrutiny to petitioner's sales of its target-marketing lists is in accord with the established principle that speech that is solely in the financial interest of the speaker and a discrete and limited audience, and that does not touch on issues of broader public concern, is less central to the values protected by the First Amendment and is thus entitled to a lesser degree of constitutional protection. Nor does the court of

appeals' application of that intermediate standard of review to the facts of this particular case warrant further review. Accordingly, this Court's review is not warranted.

1. Petitioner's principal contention (Pet. 17-25) is that the court of appeals erred in applying an intermediate level of review, rather than strict scrutiny, to the FCRA. The court of appeals' decision to apply intermediate scrutiny, however, is fully consistent with this Court's decisions and with other appellate decisions.

a. This case involves the sale of individuals' personal, nonpublic financial information to entities that wish to use that information to make solicitations in their own financial interest. The lists have no accompanying commentary from the speaker (petitioner) that links the personal information to any issue of broad public concern. But the generation of the lists necessarily does disclose personal consumer credit information —including information about individuals' credit history, loans from finance companies, and bank cards— that Congress has determined to be deserving of protection from indiscriminate dissemination. See 15 U.S.C. 1681(a)(4) (congressional finding that "[t]here is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy"). Whether or not the information imparted by target-marketing lists might be "embarrassing" as a categorical matter (see Pet. 13), it is personal information that, traditionally, has not been made a matter of public record but has been subject only to limited dissemination by individuals and their creditors.

Given the personal and nonpublic nature of the information reflected on the target-marketing lists, and

the circumscribed audience to which petitioner seeks to disseminate that information (see Pet. App. 16a-17a), the court of appeals correctly determined that petitioner's commercial use of that information is entitled only to a reduced level of constitutional protection, essentially the level of intermediate scrutiny applied in this Court's commercial speech decisions. See *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). Although petitioner's target-marketing lists do not themselves propose a commercial transaction—perhaps the classic example of commercial speech, see *Bolger* v. *Youngs Drug Prods.*, 463 U.S. 60, 66 (1983)—they are used by many of petitioner's customers for the purpose of making their own commercial solicitations. See note 3, *supra*. Thus, the sale of the information on petitioner's target-marketing lists is effectively a precursor to the classic kind of commercial speech that receives only a reduced level of constitutional protection. Petitioner's speech "can be reduced to, I [petitioner] will sell you [subscriber] the X [names and addresses of individuals] at the Y price." *United Reporting Publ'g Corp.* v. *California Highway Patrol*, 146 F.3d 1133, 1137 (9th Cir. 1998), rev'd on other grounds, 528 U.S. 32 (1999).

The court of appeals' ruling that a reduced level of constitutional scrutiny governs the application of the FCRA to target-marketing lists is consistent with the few decisions of other courts of appeals that have addressed similar commercial sales of lists of names and addresses, and have concluded that such transactions are properly analyzed under the commercial speech doctrine.[4] For example, in *United Reporting Publishing*, *supra*, the Ninth Circuit concluded that the plaintiff's desired sale of names and addresses of arrestees to customers who would use those lists for solicitation purposes was a "pure economic transaction * * * comfortably within the core notion of commercial speech." 146 F.3d at 1137 (internal quotation marks omitted). Similarly, in *US West, Inc.* v. *FCC*, 182 F.3d 1224 (1999), cert. denied, 530 U.S. 1213 (2000), the Tenth Circuit, in examining an FCC regulation that restricted telecommunications carriers from disseminating, within the carrier, information about customers' telecommunications services, applied the well-settled *Central Hudson* commercial speech test. The court noted that, "when the sole purpose of the intra-carrier speech based on [customer information] is to facilitate the marketing of telecommunications services to individual customers, we find the speech integral to and inseparable from the ultimate commercial solicitation." *Id.* at 1233 n.4. Here as well, the sale of target-marketing lists to petitioner's list purchasers is integral to and inseparable from the commercial solicitations for which

[4] Petitioner maintains (Pet. 24) that, in *Equifax Services, Inc.* v. *Cohen*, 420 A.2d 189 (Me. 1980), cert. denied, 450 U.S. 916 (1981), the Supreme Judicial Court of Maine invalidated part of Maine's analogue to the FCRA on the ground that the state statute was a "direct content-based restraint on speech" and not a content-neutral time, place, and manner restriction. But we have not argued, and the court of appeals did not rule, that the application of the FCRA should receive reduced constitutional scrutiny because it is a content-neutral time, place, and manner restriction. Indeed, the category of "commercial speech" is inherently content-based, and yet (as the court of appeals observed, Pet. App. 19a), this Court has consistently held that regulations of commercial speech are subject to a reduced level of constitutional scrutiny. Thus, in *Equifax*, the Maine court assumed that the statute at issue should be analyzed as a regulation of commercial speech, see 420 A.2d at 195, and it applied the *Central Hudson* test governing regulations of commercial speech, see *id.* at 197-198.

those list purchasers intend to use the lists,[5] and therefore is properly analyzed under the test applicable to commercial speech, which provides a reduced level of constitutional immunity from regulation.[6]

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[5] As we have noted (see note 3, *supra*), petitioner points to some instances in which its customers purchased, or wished to purchase, target-marketing lists in order to solicit political or charitable donations. Petitioner has not claimed, however, that its target-marketing business was limited to sales for those purposes, nor did it seek authorization in these proceedings to market lists whose use would be limited solely to those purposes. Accordingly, the conduct at issue in this case is petitioner's sale of lists for essentially unrestricted use in target marketing.

[6] Petitioner argues (Pet. 24) that the decision of the court of appeals conflicts with the decision of the California Court of Appeal, Second District, in *U.D. Registry, Inc.* v. *State*, 40 Cal. Rptr. 2d 228 (1995), review denied, No. B077282 (Cal. Aug. 17, 1995), cert. denied, 516 U.S. 1074 (1996). In *U.D. Registry*, the state court concluded that lists of consumers involved in unlawful detainer actions, which were sold by U.D. Registry, constituted fully protected speech. The court reached that conclusion, however, only because it incorrectly concluded that the only commercial speech that receives reduced First Amendment protection is speech specifically proposing a commercial transaction. *Id.* at 230.

In any event, a conflict with an intermediate state appellate court does not ordinarily warrant this Court's review on certiorari, see Sup. Ct. R. 10(a), because the state supreme court may eventually examine the issue and resolve the conflict without the need for this Court's intervention. Thus, it is at least premature to assert, as petitioner does (Pet. 16, 25), that the California state courts would not apply commercial-speech analysis in civil actions alleging that petitioner disseminated personal information in violation of the FCRA. Should the California Supreme Court (or another California court of appeal) eventually be presented with issues similar to those presented in this case, it might well follow the more recent decisions of three federal appellate courts that we have just discussed (including a decision of the Ninth Circuit) to the effect that the sale of lists of names and addresses and other personal information to customers who intend to use that information for solicitation purposes is properly analyzed under the test applicable to commercial speech.

b. The court of appeals also drew support from *Dun & Bradstreet, Inc.* v. *Greenmoss Builders*, 472 U.S. 749 (1985), for application of a reduced level of constitutional scrutiny. In *Dun & Bradstreet*, a construction contractor brought a defamation action seeking punitive damages against a consumer reporting agency that had issued a false consumer report to the contractor's creditors. Previously, in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), this Court had held that, absent a showing of actual malice, the First Amendment prohibits an award of punitive damages to a private individual for a defamatory statement that involves a matter of public concern. In *Dun & Bradstreet*, the Court declined to extend the malice requirement of *Gertz* to defamatory statements that do not implicate a matter of public concern. See 472 U.S. at 758-759 (opinion of Powell, J.) (stressing that "not all speech is of equal First Amendment importance," and that it is "speech on matters of public concern that is at the heart of the First Amendment's protection") (citations and internal quotation marks omitted); *id.* at 764 (Burger, C.J., concurring in the judgment) (distinguishing *Gertz* as "limited to circumstances in which the alleged defamatory expression concerns a matter of general public importance"); *id.* at 774 (White, J., concurring in the judgment) (declining to apply *Gertz* because "the defamatory publication in this case does not deal with a matter of public importance").[7]

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[7] Petitioner (Pet. 17-18), joined by some of its amici (Coalition for Sensible Public Records Access Br. 5-6; Washington Legal Foundation Br. 19-20) attempts to reinterpret *Dun & Bradstreet* by arguing that the crucial factor in that case was not that the

The court of appeals in this case stressed that, here as in *Dun & Bradstreet*, the speech at issue does not address any matter of public concern, and so does not implicate core First Amendment values of vigorous discussion of public issues. Petitioner argues that *Dun & Bradstreet*'s distinction between matters of public concern and purely private speech should not be extended to the area of privacy protection. See Pet. 20-21. But this Court's most recent decision examining the balance between the important interest in protecting personal privacy and First Amendment values

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speech did not address a matter of public concern, but rather that it was false. But of course, every defamation case involves speech that is at least alleged to be false; what distinguished the false and defamatory credit report at issue in *Dun & Bradstreet* from the false and defamatory statements at issue in other cases (such as *Gertz*) that received more stringent constitutional protection was the fact that the credit report in *Dun & Bradstreet* did not address a matter of public concern. See *Dun & Bradstreet*, 472 U.S. at 760 (opinion of Powell, J.) ("In *Gertz*, we found that the state interest in awarding presumed and punitive damages was not 'substantial' in view of their effect on speech at the core of First Amendment concern. This interest, however, *is* 'substantial' relative to the incidental effect these remedies may have on speech of significantly less constitutional interest.") (citation omitted).

There is also no merit to petitioner's suggestion (Pet. 18) that its lists are somehow entitled to more First Amendment protection than the credit report in *Dun & Bradstreet* because its lists include information regarding "thousands (or more) of potential consumers," whereas the *Dun & Bradstreet* report contained information regarding only one company. What is important is not the length of petitioner's lists but the fact that the information about each person on the lists is generally considered private, and that—as in *Dun & Bradstreet*—the information does not address issues of public import and is disseminated only to a restricted audience. Pet. App. 16a; compare *Dun & Bradstreet*, 472 U.S. at 762 (opinion of Powell, J.).

demonstrates that whether the information at issue turns on a matter of public concern is often fundamental to answering the constitutional question whether public dissemination of that information may be regulated.

In *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001), the Court addressed a constitutional challenge to the application of 18 U.S.C. 2511(1)(c), which prohibits any person who, knowing or having reason to know that an electronic communication was illegally intercepted, discloses the content of that communication. The case involved the dissemination of a taped conversation (which had been unlawfully intercepted) between officials of a public school teachers' union discussing tactics in collective bargaining negotiations with the school board. The Court accepted that Section 2511(1)(c) promotes "[p]rivacy of communication," an "important interest." 532 U.S. at 532. But the Court found the application of Section 2511(1)(c) to the facts of the case to be unconstitutional *because* the taped conversation involved matters of public concern: "The enforcement of that provision in these cases, however, implicates the core purposes of the First Amendment *because* it imposes sanctions on the publication of truthful information *of public concern*." *Id.* at 533-534 (emphasis added); see also *id.* at 535 ("[A] stranger's illegal conduct does not suffice to remove the First Amendment shield from speech *about a matter of public concern*.") (emphasis added); *id.* at 535-536 (Breyer, J., concurring) (emphasizing that "the information publicized involved a matter of unusual public concern"); *id.* at 540 (observing that "the subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters").

Petitioner invokes (Pet. 19) the so-called *Daily Mail* principle for the proposition that the government may

not prohibit the publication of lawfully obtained information. The Court in *Bartnicki* explained quite clearly, however, that the *Daily Mail* line of cases stands for the proposition that, "if a newspaper lawfully obtains truthful information *about a matter of public significance* then state officials may not constitutionally punish publication of the information, absent a need * * * of the highest order." 532 U.S. at 527-528 (quoting *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)) (emphasis added); see also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978) (invalidating a prohibition against publication of non-public proceedings of a state judicial review commission, a matter "of utmost public concern"). Thus, *Daily Mail* and its progeny simply do not control a case like this one, in which the substance of the disseminated information is not of general interest to the public.[8]

Contrary to petitioner's contention (Pet. 19-20), the decision below does not establish an inflexible rule that invariably elevates privacy in matters lacking public

[8] *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), is similarly inapposite in this context. In that case, the Court recognized the "strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association," *id.* at 912, but held that the government's authority to regulate economic activity "could not justify a complete prohibition against a nonviolent, *politically motivated* boycott," *id.* at 914 (emphasis added). Thus, the Court ruled that the state could not constitutionally prohibit participants in the boycott from publishing the names of boycott violators. In that case, however, the speech at issue—the names of boycott violators—imparted information central to a political controversy to a public audience. By contrast, petitioner's target marketing lists reveal no information that is itself of political significance or otherwise of public concern, and are not addressed to the public at large.

concern over the First Amendment value of free speech. To the contrary, the intermediate level of scrutiny applicable to the regulation of commercial speech is highly context-sensitive, and the government must show that such a regulation is narrowly tailored and directly promotes a substantial governmental interest. See *Central Hudson*, 447 U.S. at 566. It is petitioner's submission that is sweeping and categorical, for it would place on the government the onerous burden of satisfying strict scrutiny in virtually every regulatory effort to protect privacy in personal information. No decision of this Court designates personal privacy as so minor a factor in the constitutional calculus.[9]

Moreover, petitioner's contentions concerning sales of its target-marketing lists must be considered in the

[9] There is no basis for petitioner's alarmist assertion that the court of appeals' narrowly focused decision has the potential to "strip[]" speakers of their First Amendment rights (Pet. 23). The court of appeals' analysis of this case turned on the particular nature of the information at issue, which traditionally has not been subject to public dissemination, as well as the purposes to which that information is put when petitioner sells target-marketing lists. It does not follow that newspapers could be prohibited from reporting home sales (since such sales are often placed by local governments on the public record in land records offices) or the fact that an individual worked for a particular employer (since there is a much greater likelihood that that information would have already found its way into the public domain). The application of any privacy-protection measure broader than that in the FCRA would, of course, turn on a fact-sensitive application of the constitutional standards to the particular speech at issue in the case. *This* case, however, involves information that is intensely personal in nature, that generally is not disclosed to the public, that does not address issues of broad public concern, and that is disseminated by petitioner only to a discrete and limited audience.

context of the FCRA's overall regulatory scheme, which governs an aspect of the economy, consumer reporting, that has long been subject to government regulation. The FCRA restricts who may receive copies of consumer reports and sets forth procedures whereby consumers may obtain copies of their reports, 15 U.S.C. 1681g (1994 & Supp. V 1999); sets the charges for such copies, 15 U.S.C. 1681j (1994 & Supp. V 1999); creates a procedure whereby a consumer may dispute the accuracy of a report, 15 U.S.C. 1681i (1994 & Supp. V 1999); and establishes the responsibilities of those who furnish information to consumer reporting agencies, 15 U.S.C. 1681s-2 (Supp. V 1999). Petitioner is apparently of the view that all of these regulations must be subject to strict scrutiny because they all bear on the consumer reporting agency's ability to engage in speech. But this Court has long held that, in light of the government's substantial interest in regulating commercial arrangements for the benefit of the individual consumer (here, the creation, accuracy, and sale of consumer reports), the government may also regulate the speech that is an incident of that arrangement, subject to a reduced level of First Amendment protection. See *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978); *Edenfield* v. *Fane*, 507 U.S. 761, 767 (1993); see also *SEC* v. *Wall Street Publ'g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988) (noting that, when the government extensively regulates a field of economic activity, its power to regulate the communications of affected businesses "is at least as broad as with respect to the general rubric of commercial speech"), cert. denied, 489 U.S. 1066 (1989).

2. Under the settled constitutional test governing commercial speech, a regulation of commercial speech will be upheld when the government interest served by

the regulation is substantial, the regulation directly advances that governmental interest, and the restriction is not more extensive than reasonably necessary to accomplish the interest. *Central Hudson*, 447 U.S. at 566. Under a proper application of that test, the FCRA's application to target-marketing lists is constitutional.

a. First, the court of appeals correctly held that the government's asserted interest, "protecting the privacy of consumer credit information—is substantial." Pet. App. 14a. Without directly asserting that the protection of privacy is *not* a substantial governmental interest, petitioner expresses skepticism about the wisdom of regulations intended to protect privacy. See Pet. 13-14.

This Court has recognized, however, that protection of privacy is a substantial government interest. See *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 625 (1995). The Court has also explained, in contexts other than First Amendment claims, that the essence of an individual's personal privacy is "control of information concerning his or her person," *Department of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989), and that individuals have, in at least some contexts, a substantial privacy interest even in their names and addresses, especially since disclosure of names and addresses can subject individuals to "commercial advertisers and solicitors." *United States Dep't of Defense* v. *FLRA*, 510 U.S. 487, 501 (1994); see *United States Dep't of State* v. *Ray*, 502 U.S. 164, 175 (1991) (noting that individuals have a privacy interest in "highly personal information regarding * * * employment status [and] * * * living conditions"). An individual's privacy interest (and, concomitantly, the government's interest in protecting that privacy) is

even greater where (as here) release of the name is equivalent to release of personal, nonpublic financial information about the individual.

b. The court of appeals further ruled that the FCRA's application to target-marketing lists "unquestionably advances the identified state interest" in protecting consumer privacy. Pet. App. 19a. As the court explained, "the government cannot promote its interest [in protecting consumers from unwarranted disclosure of their private information] except by regulating speech because the speech itself (dissemination of financial data) causes the very harm the government seeks to prevent." *Ibid.* No speculation or conjecture is necessary to reach that conclusion; rather, the judgment is based on "simple common sense" (*Went For It*, 515 U.S. at 628).

Petitioner argues that the FCRA's protection of privacy is underinclusive because the Act does not prohibit "prescreening"—*i.e.*, the disclosure of consumer reports (including individuals' names and addresses, under circumstances that reveal credit information about those individuals) to companies that intend to use that information to extend firm offers of credit or insurance to individuals that meet their credit-related eligibility criteria. Petitioner suggests that, because Congress in 1996 permitted the disclosure of consumers' names and addresses for the narrow purpose of facilitating firm offers of credit and insurance, the statutory restrictions against disclosures of consumers' names and addresses for other purposes, including target marketing, must fail. See Pet. 25-28.

Petitioner's underinclusiveness argument fails to acknowledge, however, that individuals may have a substantial privacy interest in avoiding the dissemination of their personal information even when that

information is not otherwise maintained in complete secrecy. As this Court explained in *Reporters Committee*, "the fact that 'an event is not wholly "private" does not mean that an individual has no interest in limiting disclosure or dissemination of the information.'" 489 U.S. at 770 (quoting Rehnquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, *Nelson Timothy Stephens Lectures*, Univ. of Kansas Law School, pt. 1, p. 13 (Sept. 26-27, 1974)). Thus, even though the FCRA does permit consumer reporting agencies to provide consumer reports, including reports containing the information at issue in this case, for a few narrow purposes, it does not follow that individuals do not have a substantial privacy interest in ensuring that the same information is not disseminated for other purposes.

Petitioner's argument also rests on an incomplete account of the statutory provision that permits, under limited circumstances, disclosure of consumer reports for prescreening. It must first be understood that the FCRA has always permitted consumer reporting agencies to furnish consumer reports for certain specific and limited purposes. Congress has recognized that credit-related information in consumer reports is highly useful to facilitate consumers' access to important financial services, especially credit and insurance. On that basis, Congress has concluded that the benefit to consumers in facilitating access to credit and insurance is sufficiently important to outweigh the particular infringement on privacy caused by dissemination of credit-related information in consumer reports to credit grantors and insurance underwriters. See 15 U.S.C. 1681b(3)(A) and (C) (1970); 15 U.S.C. 1681b(a)(3)(A) and (C) (Supp. V 1999). Congress's privacy-protection objective in the FCRA was not to squelch all circulation of

consumer credit information, but rather to ensure that that sensitive information is used only for those purposes to which consumer credit information is closely related.

The FTC interpreted the FCRA to permit consumer reporting agencies to furnish consumer reports for the purpose of prescreening for firm offers of credit long before Congress codified that understanding into law in 1996. As the FTC explained in 1973 (when it first expressed that understanding) and again in 1990 (when it reexamined the issue), the FCRA specifically permits a consumer reporting agency to furnish a consumer report to anyone who "intends to use the information in connection with a credit transaction involving the consumer," 15 U.S.C. 1681b(3)(A) (1970).[10] As the FTC explained, businesses that use prescreened lists to extend firm offers of credit to consumers fall within the scope of that statutorily permissible purpose because they intend to use the information to enter into a credit transaction with the consumer, if the consumer accepts the firm offer of credit. See 55 Fed. Reg. 18,807 (1990); 38 Fed. Reg. 4947 (1973).

When Congress codified the permissible use of consumer reports for prescreening for credit and insurance in 1996, it *restricted* that use to some degree. Congress limited the consumer information that may be placed on prescreened lists and also required consumer reporting agencies to maintain an opt-out system whereby consumers can prevent use of their personal information

[10] Similarly, the FCRA has always permitted a consumer reporting agency to furnish a consumer report to one who "intends to use the information in connection with the underwriting of insurance involving the consumer." 15 U.S.C. 1681b(a)(3)(C) (Supp. V 1999); 15 U.S.C. 1681b(3)(C) (1970).

for prescreening. See 15 U.S.C. 1681b(c) (Supp. V 1999). At the same time, Congress did not amend the FCRA to expand the permissible disclosure of personal credit information for general solicitation purposes. Congress's decision not to allow a broader use of personal credit information for target marketing reflects its sensible judgment, reached previously by the FTC, that disclosure of the sensitive consumer credit information that credit bureaus compile (see 15 U.S.C. 1681a(f)) should be limited to those specific and narrow purposes where (Congress concluded) the consumer's interest in improved access to financial services outweighs the infringement on personal privacy caused by that limited dissemination of personal financial information.

There is therefore no merit to petitioner's assertion (Pet. 27) that the FCRA's restrictions on the disclosure of consumer credit information are so pierced by "exemptions and inconsistencies" that they fail to advance the statutory purpose of protecting personal privacy in financial information. Cf. *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476, 489 (1995). The permissible purposes for disclosure of consumer credit information in the FCRA (including prescreening) are simply part of one of the overarching objectives of the FCRA—to improve the quality of the process by which consumers obtain credit and insurance, by ensuring that credit grantors and insurance underwriters obtain the accurate information that they need to make an informed decision whether to grant credit or to provide insurance to a particular individual.[11] But disclosure of consumer credit informa-

[11] See 115 Cong. Rec. 33,408 (1969) (statement of Sen. Proxmire) ("The bill recognizes the vital role played by credit reporting agencies in our economy. Those who extend credit or insurance or

tion for target-marketing purposes would result in a much broader dissemination of individuals' personal financial information, far beyond the limited spheres of credit and insurance that are at the core of the FCRA.

Congress has concluded that the benefits that consumers obtain from credit and insurance transactions make acceptable the limited infringement on consumers' privacy that results from disclosure of credit-related information to facilitate those transactions, but it has concluded that the balance does not tip the same way with respect to general solicitation. Petitioner would strike the balance differently, but its disagreement with Congress's judgment does not render the FCRA unconstitutional. See *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 434 (1993) ("Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments.").

c. Finally, petitioner argues that the FCRA is not narrowly tailored because, it asserts, Congress should have adopted an "opt-out" approach allowing disclosure of consumer credit information unless the consumer specifically objects, rather than requiring affirmative consumer permission for disclosure (except for the specific statutorily permissible purposes). Petitioner argues that an opt-out mechanism would be an equally effective means to protect consumer privacy that would be less intrusive on its speech interests. See Pet. 9, 26 & n.15.

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who offer employment have a right to the facts they need to make sound decisions."); *id.* at 33,412 (statement of Sen. Williams) ("No one disagrees with the premise that those who extend credit have a right to the facts needed in order to make sound decisions.").

It is scarcely obvious, however, that an opt-out approach requiring consumers to *object* to dissemination of their personal information is as effective a means to protect personal privacy as is an opt-in approach requiring affirmative consumer consent before information may be disclosed. The effectiveness of any opt-out approach to protect personal privacy depends crucially on the way in which individuals are provided notice of their entitlement to opt out and the ease with which they may make their preferences known. Moreover, the problem with any opt-out approach is that individuals may not fully appreciate the significance of what they are being asked to do: they may not pay attention to mailings advising them of the right to opt out, or they may inadvertently fail to register their preference. By contrast, an opt-in approach requiring affirmative consent to disclosure guarantees that dissemination of personal information will be based on the individual's *informed* approval. Thus, a requirement of affirmative consumer approval for disclosure of information in a consumer report (for purposes other than those expressly made permissible by the statute) is, at a minimum, "reasonably well tailored" to the government's important interest in protecting consumer privacy in personal credit-related information. Cf. *Went For It*, 515 U.S. at 633.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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Andrew S. Krulwich and Bruce L. McDonald, *The Vulnerability of HIPPAA Regulations to First and Fourth Amendment Attack: An Addendum to "Evolving Constitutional Privacy Doctrines Affecting Healthcare Enterprises,"* 56 FOOD DRUG L.J. 281 (2001) 9

REPLY TO BRIEF IN OPPOSITION

In its Petition for Writ of Certiorari, Trans Union LLC ("Trans Union") showed that the D.C. Circuit's judgment in this case warrants plenary review because it impermissibly expands *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), to create a new category of truthful "private" speech subject to diminished First Amendment protection and because it improperly creates a novel rule allowing intermediate First Amendment scrutiny to be satisfied by attributing to Congress a fictional determination that the legislature never made.

The D.C. Circuit held that Trans Union could state no First Amendment claim – without regard to whether target marketing lists contain publicly available information, or are used for solicitations by political and charitable organizations such as the Republican National Committee and United Way (C.A. App. 0841-46, 2376-77, 2376). Target marketing lists of names and addresses reflect such truthful (and unremarkable) information as the fact that an individual has a home mortgage or a bank card. There has never been any finding by Congress, the FTC, the D.C. Circuit, or any other governmental body that target marketing lists contain information that is intimate or embarrassing. Target marketing lists do not disclose credit performance data, such as whether and how consumers pay their bills. The fact that a consumer has a loan secured by a mortgage is already in the public domain, as the FTC itself has recognized in a related context. 16 C.F.R. § 313.3(p)(3)(iii)(1); 65 Fed. Reg. 33657 (2000). Thus, the Government's claim that such information "traditionally has not been put to public dissemination," Brief in Opposition (BIO) 19 n.9, is flatly wrong.

The FTC's ban on Trans Union's speech serves no important governmental interest, particularly when the statute simultaneously permits the disclosure of detailed credit performance information for *billions* of insurance and credit prescreening offers *every year*. The Government overlooks the salient point that prescreening involves not merely the disclosure of target marketing information, but also the release of *more*

detailed credit performance data. The supposed tailoring of the governmental scheme borders on the absurd.

1. The D.C. Circuit's Expansion of *Dun & Bradstreet* Warrants Review. Tellingly, the Government does not defend the D.C. Circuit's decision on its own terms. Instead, the Government contends that Trans Union's expression should be treated as "commercial speech": "[a]lthough petitioner's target-marketing lists do not themselves propose a commercial transaction," "they are used by many of petitioner's customers for the purpose of making their own commercial solicitations" and are thus "effectively a precursor to the classic kind of commercial speech that receives only a reduced level of constitutional protection." BIO 12.

Even if Trans Union's speech were treated as commercial expression, the FTC's ban would still be invalid under intermediate scrutiny. But the D.C. Circuit never adopted the Government's reasoning or suggested that the target marketing lists could be treated as commercial speech. Instead, the court of appeals relied solely on *Dun & Bradstreet* to conclude that "Trans Union target marketing lists thus warrant 'reduced constitutional protection.'" Pet. App. 13a (quoting *Dun & Bradstreet*, 472 U.S. at 762 n.8). In its order denying rehearing, the court reaffirmed its reliance on *Dun & Bradstreet*. Pet. App. 16a-17a. The Government's argument that the court was merely "[d]rawing an analogy to" *Dun & Bradstreet* (BIO 8) is revisionism, pure and simple. As the case comes to this Court, the *Dun & Bradstreet* issue framed by the court of appeals is clearly presented.

The Government does not deny that the D.C. Circuit's decision conflicts with *every other appellate court decision* regarding *Dun & Bradstreet*. *No other appellate court* has applied *Dun & Bradstreet* to create a new category of truthful

"private" speech lacking full First Amendment protection.[1]

The Government cites *Bartnicki v. Vopper*, 532 U.S. 514 (2001), as support for the D.C. Circuit's decision. BIO 17. But *Bartnicki* proves the opposite of what the Govemment claims. The D.C. Circuit created a category of truthful "private" speech entitled to diminished First Amendment protection. *Bartnicki* rejected precisely such a categorical approach. *See* 532 U.S. at 528 ("refus[ing] to answer categorically whether truthful publication may ever be punished consistent with the First Amendment"). To be sure, *Bartnicki* considered whether the communication in that case involved a matter of "public concern." 532 U.S. at 533, 534, 535. But this Court did so not to lower the applicable level of First Amendment scrutiny at the outset (as the D.C. Circuit did) but rather in the course of considering whether the federal and state wiretapping statutes could survive full First Amendment scrutiny. This Court never suggested that speech of purely private concern triggers anything less than full First Amendment scrutiny.

The Government attempts to distinguish this Court's

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[1] The Government maintains that the defamatory nature of the credit report in *Dun & Bradstreet* was irrelevant to the plurality's decision. BIO 15-16 n.7. That argument fails. The plurality there stated that "speech solely in the individual interest of the speaker and its specific business audience" "warrants no special protection *when – as in this case – the speech is wholly false and clearly damaging to the victim's business reputation.*" 472 U.S. at 762 (emphasis added). The *Dun & Bradstreet* plurality opined that there was no reason to extend the "actual malice" rule of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to false statements that do not relate to matters of public concern. 472 U.S. at 762. Nothing in the plurality's opinion indicates that *truthful, nondeceptive* speech can be stripped of full First Amendment protection by deeming it a matter of "private" concern. Indeed, the *Dun & Bradstreet* plurality applied the decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which expressly rejected an attempt to extend the "actual malice" rule to all speech involving matters of "general or public interest," in part because of the difficulty of determining which communications "address issues of 'general or public interest' and which do not." 418 U.S. at 346.

decisions in *Smith v. Daily Mail*, 443 U.S. 97 (1979), *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), by arguing that these cases involved matters of "public significance," while Trans Union's speech does not. BIO 18 & n.8. That argument simply proves the ipse dixit nature of the D.C. Circuit's decision. If the "public significance" test can be met by the name of a juvenile offender (*Daily Mail*), the names of certain judges under investigation (*Landmark*), and the names of local civil rights boycott violators who fear retaliation (*Claiborne Hardware*) – not to mention the name of a rape victim which under state law is not to be made part of the "public record" of a criminal case, *The Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989), or a parody stating that Rev. Jerry Falwell lost his virginity "during a drunken incestuous rendezvous with his mother in an outhouse," *Hustler Magazine v. Falwell*, 485 U.S. 45, 48 (1988), or sexually explicit images that appear to depict minors, *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002) – then how could the "public significance" test not be satisfied by speech that the Government concedes is integral to the purchasing decisions of millions of Americans and forms one of the key foundations of our information economy? If there were any ambiguity about the meaning of the "public significance" test, or about the implications of *Bartnicki*, such uncertainty would be a further reason to grant certiorari in order to clarify the important First Amendment principles at stake.[2]

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[2] There is no basis for the Government's claim that recognizing Trans Union's First Amendment rights would set a "sweeping and categorical" precedent. BIO 19. To the contrary: it is the D.C. Circuit's decision that is unprecedented. According First Amendment protection to the communication of target marketing lists would not immunize such activity from government regulation; it would simply require government regulations to satisfy the otherwise applicable level of constitutional scrutiny. And it would pose no obstacle to rules that do not restrict speech at all but merely prevent unauthorized access to credit records or help to ensure the accuracy of such information.

2. The Government's "Commercial Speech" Argument Provides An Additional Reason for Granting Review. The Government's claim that Trans Union's expression qualifies as commercial speech cannot be squared with the plurality opinion in *Dun & Bradstreet*, which emphatically denied that its holding "leaves all credit reporting subject to reduced First Amendment protection." 472 U.S. at 762 n. 8. "We also do not hold * * * that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech." *Id.*

The Court has held that whether speech "propose[s] a commercial transaction" is "the test for identifying commercial speech." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 473-74 (1989) (holding that for-profit job counseling, tutoring, legal advice, and medical consultation in students' dormitory rooms consists of speech for profit, but does not satisfy the definition of commercial speech because it does not *propose* a commercial transaction); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993). By communicating names and addresses to its customers, Trans Union is not thereby advertising its services or otherwise proposing a commercial transaction. Rather, it is communicating information – a process that is the essence of speech.[3]

This Court has never suggested that speech is subject to diminished First Amendment scrutiny simply because it occurs in a commercial context. "Some of our most valued forms of fully protected speech are uttered for a profit." *Fox*, 492 U.S. at 482 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*)). The Government's theory is impossible to square with decisions like

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[3] The Government's claim that Trans Union is in effect proposing to sell "the X [names and addresses of individuals] at the Y price" (BIO 12) (citation omitted) describes hypothetical *advertising* of the target marketing lists but not the actual *communication* of the lists themselves. The actual transmission of the information contained in the lists does not "propose" anything.

First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) (rejecting argument that commercial speech doctrine allowed state to restrict corporation's political speech), *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 533-35 (1980) (utility bill inserts entitled to full First Amendment protection), or *Givhan v. Western Line Consol. School Dist*, 439 U.S. 410, 415-16 (1979) (First Amendment protections not reduced for speaker "who arranges to communicate privately . . . rather than to spread his views before the public" directly).

The Government's commercial speech argument would lead to anomalous results. Nearly all information could be said to be "a precursor to" "classic . . . commercial speech." BIO 12. Sellers use scientific studies, economic data, and other materials in designing and carrying out their advertising campaigns. The Government's contention that commercial speech includes expression within a speaker's "own financial interest" that lacks any "link[] . . . to any issue of broad public concern," BIO 11, would also eliminate full First Amendment protection for most business-to-business communication, as well as for much of the speech in which private citizens engage.

It is undisputed that Trans Union's target marketing lists are sometimes used to solicit contributions for charitable and political groups such as the Republic National Committee and the United Way. Under the Government's theory, the same speech by Trans Union would change from fully protected expression to commercial speech depending on the end use to which it was put by its recipient.

Hence, if anything, the Government's commercial speech argument demonstrates an additional reason to grant certiorari, in order to clarify the definition of "commercial speech." The decisions cited by the Government demonstrate the divergence of views in the lower courts:

• *Equifax Services, Inc. v. Cohen*, 420 A.2d 189 (Me. 1980), *cert. denied*, 450 U.S. 916 (1981) (cited BIO 12-13 n.4), treated

a statutory prohibition on the use or disclosure of certain types of truthful information in credit reporting as a commercial speech restriction but struck it down as "a direct content-based restraint on speech." *Id.* at 196. The D.C. Circuit held just the opposite. Pet. App. 18a-19a.

• In *U.D. Registry, Inc. v. State*, 40 Cal. Rptr.2d 228, 230 (Cal. 2d Dist. 1995), *review denied*, 1995 Cal. LEXIS 5075 (Cal. 1995), *cert. denied*, 516 U.S. 1074 (1996) (cited BIO 14 n.6), the court held that credit reports are fully protected speech under the First Amendment rather than commercial speech. The court specifically rejected *Dun & Bradstreet. Id.* at 230 n.1. Again, the D.C. Circuit held precisely the opposite.[4]

3. The D.C. Circuit's New Rule of "Imputed Congressional Findings" Warrants Review. The Government attempts to rehabilitate the D.C. Circuit's decision by re-arguing the intermediate scrutiny standard as it applies in this case. Remarkably, the Government never once addresses the D.C.

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[4] The Government speculates that the California Supreme Court, which denied review in *U.D. Registry*, might change its mind in a subsequent case. BIO 14 n.6. In the meantime, *U.D. Registry* represents the definitive view of the California courts on the matter, and Trans Union faces the very real possibility that it will be governed by one rule of law in the pending California state court action and a different rule in federal court. *See* Cert. Petition 25. The Government also relies on two cases not involving credit reports which similarly underscore the need for this Court's review:

• *United Reporting Publ'g Corp. v. California Highway Patrol*, 146 F.3d 1133, 1136 (9th Cir. 1998), *rev'd*, 528 U.S. 32 (1999) (cited BIO 12-13), involved the release of arrest records by the government and opined that the definition of "commercial speech" is "not . . . settled" and is "'subject to doubt.'"

• *U S WEST, Inc. v. FCC*, 182 F.3d 1224, 1233 n.4 (10th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000) (cited BIO 13), concerned the use of telecommunications data for marketing purposes and observed that the commercial speech definition is "admittedly unclear" and that "the [Supreme Court] has not offered any nuanced distinctions" in its formulations of the definition.

Circuit's central holding that intermediate scrutiny was satisfied, despite the FTC's disparity in treatment between prescreening and target marketing lists, because "Congress *apparently believes* that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." Pet. App. 22a (emphasis added).

Instead, the Government advances a misleading description of the prescreening exception by implying that it entails the disclosure merely of "consumers' names and addresses" and "the same information" involved in target marketing lists. BIO 22, 23. The Government is incorrect. Under 15 U.S.C. § 1681b(a)(3)(A), (C), and (c)(1)(B)(i), prescreening offers involve the disclosure of detailed credit performance information, including bill payment history. This information is much more detailed than the data contained in target marketing lists. It is no answer to assert – as the Government does, citing no evidence or congressional findings – that "Congress has concluded" that the peoples' calculus of costs and benefits is different for prescreening and targeting marketing. BIO 23. There is no evidence in the legislative or administrative record to support the Government's assertion, which is essentially the same fail-safe deferential approach as that employed by the D.C. Circuit. Indeed, the Government's argument is undermined by its own claim that Congress acted to "restrict" prescreening "to some degree" in 1996. BIO 24. If that is true, there is even less reason to impute to Congress a fictional finding that opt-out is a sufficient protection for prescreening but not for target marketing.

The Government insists that it may rely on "simple common sense" (BIO 22) (citation omitted), but the disparity in the FTC's treatment of prescreening and target marketing reflects anything but "common sense." It is utterly paradoxical. And the only available congressional and administrative findings undermine the tailoring of the governmental scheme. *See* Cert. Pet. 26-27. The Government cannot point to a single reported decision by

any court that has found intermediate scrutiny satisfied in such circumstances.[5]

4. This Case Presents Important Issues Warranting this Court's Review. In the end, the Government seeks to convey the impression that this case involves technical issues with no implications beyond the effects on the immediate parties. Nothing could be further from the truth. The decision below has already been applied in other FCRA cases. *FTC v. Citigroup Inc.*, 2001 U.S. Dist. LEXIS 22149, *13-14 (N.D. Ga. Dec. 27, 2001). This case is the logical successor to *Los Angeles Police Dept. v. United Reporting Corp.*, 528 U.S. 32 (1999), and presents important questions about the relationship between privacy rights and the First Amendment that this Court did not resolve in *LAPD*. Moreover, the Government studiously ignores six *amici curiae* briefs in support of petitioner:

• The Coalition for Sensible Public Records Access (CSPRA) notes that "[t]he D.C. Circuit's decision threatens not only [Trans Union's] expression, but also the expression of the many businesses and organizations that rely on [its] target marketing lists, and myriad other valuable uses of accurate, lawfully obtained information that undergird the information economy." CSPRA Br. 2.

• The Information Services Executive Council of the Direct Marketing Association (DMA) demonstrates that this case

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[5] *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) (cited BIO 21), did not involve speculation but pointed to extensive evidence "noteworthy for its breadth and detail" that was based on a two-year empirical study. *Id.* at 627. Commentators have noted that "the D.C. Circuit panel [in *Trans Union*] required much less agency justification that the privacy interest being advanced was a substantial state interest than was required" in other cases. Andrew S. Krulwich and Bruce L. McDonald, *The Vulnerability of HIPPAA Regulations to First and Fourth Amendment Attack: An Addendum to "Evolving Constitutional Privacy Doctrines Affecting Healthcare Enterprises,"* 56 FOOD DRUG L.J. 281, 296 (2001).

involves a "matter of immense public importance" and that the "threatened negative impact" of the decision below "is both broad and substantial." "Not only does this ban threaten direct marketing's important role in the national economy, it threatens to remove substantial economic efficiencies and ease of service enjoyed by consumers. It also threatens the economic viability of non-profit organizations (including charities and political entities) . . . ." DMA Br. 4-5.

• The Consumer Data Industry Association (CDIA) observes that the decision below "will affect the constitutional protection afforded consumer reporting agencies' speech beyond the facts of the *Trans Union* decision." CDIA Br. 5.

• The Washington Legal Foundation (WLF) explains that the D.C. Circuit's decision "carves out a broad category of speech deemed of lesser importance," "threatens to disrupt large segments of American commerce, and authorizes suppression of large amounts of speech – both commercial and (as here) noncommercial in character – not previously subject to any form of governmental regulation." WLF Br. 5-6.

• The Progress and Freedom Foundation (PFF) shows that "[t]he Court should grant the Trans Union petition to ensure that First Amendment interests receive proper protection in this era in which courts increasingly will confront cases involving speech regulation in the name of privacy." PFF Br. 5.

• The Competitive Enterprise Institute (CEI) demonstrates that the D.C. Circuit's judgment conflicts with decisions of this Court and of other appellate courts. CEI Br. 4-9.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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No. 01-1080

IN THE

Supreme Court of the United States

TRANS UNION CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONER

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18pp

QUESTIONS PRESENTED

1. Does this court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), create a category of speech that is removed from the full protection of the First Amendment, on the grounds that this speech is not related to a matter of "public concern?"

2. Does the requirement that the government show at least a substantial interest in imposing a content-based restriction on speech (the use of a list of names and addresses used to communicate information about products and services to consumers or to solicit charitable donations) oblige the court to conduct some meaningful review of the government's alleged interest and tailoring?

3. Does the value of the use of a list of names and addresses used in targeted marketing to consumers and businesses mean that the restriction in this case should be subjected to strict scrutiny, although it may be closely akin to commercial speech?

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BRIEF FOR *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

Amicus Curiae the Competitive Enterprise Institute is a nonpartisan policy analysis organization, dedicated to the principles of limited constitutional government and free enterprise. The Competitive Enterprise Institute has the written consent of both parties to file this brief with the court.

[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* state that no counsel for any party to this dispute authored this brief in whole or in part and no person or entity other than *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief.

Competitive Enterprise Institute scholars have produced key articles concerning the balance between the First Amendment's protection of freedom of information and the regulation of consumer data.[2] The Competitive Enterprise Institute has a substantial interest in supporting the position of the petitioner to uphold the first amendment rights of lawful businesses to exchange truthful information about real people. The Competitive Enterprise Institute believes that the lower court's approval of the weak rationale proffered in support of the restrictions on speech crafted by the Federal Trade Commission in this case amounts to a substantial departure from this Court's opinions requiring meaningful first amendment protection for truthful speech.

SUMMARY OF ARGUMENT

The D.C. Circuit below in *Trans Union II* and *III* considered a first amendment challenge to the FTC's decision to require Trans Union to individually contact customers to get them to "opt in" before their names and addresses (regulated as "credit reports" but not the in fact the full report) could be used for targeted marketing. The Circuit Court determined that, because this Court had held in *Dun & Bradstreet* that credit reports were "private speech" of lesser first amendment value, that the FTC's regulation would be subject to intermediate rather than full scrutiny. However, the "private speech" inquiry of *Dun & Bradstreet* is a throwback to days when only newsworthy speech was fully protected, and ought not to be

[2] Solveig Singleton, *Privacy Versus the First Amendment: A Skeptical Approach*, XI Fordham Intellectual Property, Media & Entertainment Law Journal 97 (Autumn 2000); Competitive Enterprise Institute, *The Future of Financial Privacy: Private Choices Versus Political Rules* (2000); Solveig Singleton, *Privacy as Censorship: A Skeptical View of Proposals to Regulate Privacy in the Private Sector*, Cato Institute Policy Analysis No. 295, January 22, 1998.

expanded outside of its original context, a defamation case. Its application to Trans Union's speech, which is truthful, is entirely inappropriate and, indeed, bizarre.

Perhaps because the D.C. Circuit chose to rely on the confusing "private speech" doctrine, the D.C. Circuit failed to apply the "substantial interest" test it chose to employ with any sort of rigor. It might just as well have been applying a rational basis test. It failed to identify any concrete government interest in the regulations in question other than a general interest in privacy. Given that the *question in the case* was whether the government's claimed interest in privacy is legitimate, given the protection the first amendment generally gives to truthful speech, the lower court's reasoning was essentially circular. And it entirely failed to consider different types of regulation that would have served the government's legitimate interests as well or better, particularly opt-out.

Because the D.C. Circuit's analysis below was, frankly, defective, the question remains of whether the commercial speech doctrine would have served as a better framework for analysis. The speech in question—the communication of lists of names and addresses that fit certain criteria between businesses—is not itself advertising. It may be ultimately used in for-profit advertising, or in political speech, or for other purposes. So the applicability of the commercial speech doctrine is an open question. But in any case, the information Trans Union seeks to communicate here is valuable, not only to businesses but to consumers. And the regulation in question, because of the enormous expense and inconvenience of opt-in requirements, amounts to a virtual ban on the speech. This speech is thus an ideal candidate for heightened scrutiny, although it may be closely akin to commercial speech.

ARGUMENT

I. THE "PUBLIC CONCERN" TEST SHOULD BE CONFINED TO DEFAMATION CASES.

The first issue presented by this case is how the "public concern" doctrine of *Dun & Bradstreet* will be applied outside the context of a defamation action. The Circuit Court below applied the "public concern" doctrine of *Dun & Bradstreet* to determine that Trans Union's communication of lists of names and addresses to use in marketing would be subject to only intermediate scrutiny 472 U.S. 749 (1985); *Trans Union III*, 267 F.3d 1138, 1141 (D.C. Cir. 2001). This holding bizarrely and unwisely expands the "private speech" language of *Dun & Bradstreet* outside of the defamation context to truthful speech restricted by a *de facto* prior restraint.

Dun & Bradstreet involved a defamation action brought against the purveyors of a false credit report to five businesses. The *Dun & Bradstreet* Court ruled that the plaintiff need not prove "actual malice," the defamation standard appropriate to a media defendant, in the action against the credit bureau. The Court reasoned that the credit report, sent to only five businesses, was not a matter of "public concern," familiar enough language in inquiries into the constitutionality of defamation torts. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). The *Dun & Bradstreet* Court added, "speech on matters of purely private concern is of less First Amendment concern" 472 U.S. 749,759-760.

Commentators have noted that the "public concern" inquiry, both in defamation cases and in its other doctrinal niche, inquiries into the free speech rights of government employees, is barely coherent and should not be expanded.[3] The "public concern" test began to be used at a time when

[3] *See,e.g.,* Volokh, 52 Stan. L. Rev. at 1097-98; Gilles, 41 Case W. Res. L. Rev. at 739.

newsworthy speech was considered the only speech worthy of first amendment protection, even before entertainment such as movies was brought into the free speech fold.[4] It hearkens back to the late nineteenth century, when most judges thought only speech in the "public interest" was protected by the first amendment.[5] The public/private speech dichotomy is inconsistent with many first amendment precedents long recognizing free speech rights beyond the newspaper headlines. It is unlikely that the framers, some of whom thought that its enumerated powers constrained Congress so narrowly that the Bill of Rights was not necessary,[6] intended to empower Congress to regulate private speech (which would presumably include ordinary conversations, letters, private journals, and so on).[7]

Nevertheless the D.C. Circuit applied the "public concern" doctrine to the communication of Trans Union's marketing lists to other businesses as justification for giving the speech less first amendment protection. The content of the list in Trans Union's case is concededly accurate, not false and defamatory; the D.C. Circuit's decision wrongly expands *Dun & Bradstreet* to truthful speech, outside of the defamation context. Furthermore, the restraint in this question is not the mere threat of a "chill" on speech created by the post hoc risk

[4] *See* Zimmerman, 9 DePaul-Ica J. Art & Ent. L. & Pol'y at 58, nn. 59-63.

[5] *See generally* David M. Rabban, *Free Speech in its Forgotten Years* (1997).

[6] *See, e.g.,* James Wilson, Speech in the State House Yard, Oct. 6, 1787 *in* 2 *The Documentary History of the Ratification of the Constitution* 167-72 (Merrill Jensen ed., State Historical Soc. of Wis. 1976); The Federalist No. 84, at 513-15 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *Wallace v. Jaffree*, 472 U.S. 38, 94 (1985)(Rehnquist, J., dissenting).

[7] Singleton, XI Fordham Intell. Prop. Media & Ent. L.J. at 137-39.

of a tort suit; as we discuss further below, the opt-in regime is so restrictive is operates as a *de facto* prior restraint.

The Supreme Court should take this opportunity to clarify that the "public concern" language of *Dun & Bradstreet* was not intended to create a new category of truthful speech to be withdrawn from full protection of the first amendment. It may also take this opportunity to clarify the application of the commercial speech doctrine to the communication of information about consumers between businesses, a question that the lower courts may now begin to encounter with more frequency. *See, e.g., U.S. West v. F.C.C.*, 182 F.3d 1224 (10th Cir. 1999).

II. IN SUBJECTING REGULATION TO A "SUBSTANTIAL INTEREST" TEST UNDER THE FIRST AMENDMENT, THE COURTS MUST SUBJECT THE GOVERNMENT'S CLAIMS TO MEANINGFUL ANALYSIS.

Even assuming that the D.C. Circuit was correct in applying a substantial interest test to the regulation in question, the court did not do so properly. In considering Trans Union's challenge to the FTC's restriction on the communication of its lists, the Circuit court converts the "substantial interest" test into a sort of truncated rational basis test. This failure to treat the conflict between the restriction on speech in this case and the first amendment seriously is inconsistent with the close scrutiny this Court has traditionally given to restrictions of truthful speech.

A. The Government's Alleged Interest May Not Be Substantial

The D.C. Circuit first gave short shrift to Trans Union's first amendment case in assessing the nature of the government's interest in this case. In asserting that the government had a

substantial interest in the restrictions, Judge Tatel's initial opinion offered only the following:

> The "Congressional findings and statement of purpose" at the beginning of the FCRA state: "There is a need to insure that consumer reporting agencies exercise their grave responsibilities with . . . respect for the consumer's right to privacy." Contrary to the company's assertions, we have no doubt that this interest—protecting the privacy of consumer credit information—is substantial" *Trans Union II*, 245 F.3d 809, 818 (2001).

The D.C. Circuit's opinion upon rehearing merely referred briefly to the government's "interest in protection of personal financial data" *Trans Union III*, 267 F.3d. at 1142.

For the government to have a substantial interest in protecting consumer's privacy by the opt-in scheme in question, however, there must be some threat to consumer's privacy rights to protect against. But the legitimate scope of our privacy rights as consumers does not ordinarily extend to our names and addresses, or to most other facts about ourselves. On many occasions the courts have stepped in to protect the right to disseminate such information when it is found in the public records. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). Indeed, if privacy rights did extend so far, credit reports could not legally exist at all. Nor could journalism. The legal system *does* recognize privacy rights against the private sector in the form of narrowly construed common-law actions and some statutes. But when it comes to conflicts with the first amendment, those privacy rights, like defamation, have often been narrowly confined to protect free speech.[8] This dovetails with intellectual property law, as well, which recognizes that copyrights do not extend to facts or opinions. *See Feist Publications Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

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[8] Singleton, XI Fordham Intell. Prop. Media & Ent. L.J. at 114.

Congress's legitimate interests cannot extend to turn the normal rule that people may exchange facts about one another on its head, without some specific showing of how people will actually be harmed by this. Will they be embarrassed by the possibility that someone might imply from their inclusion on a given market list that they have a mortgage or a checking account? Is this the sort of harm that Congress can legitimately regulate? Does the harm to be prevented outweigh the benefit of the speech in question? These are questions that the first amendment requires the government to answer. That answer has not been forthcoming in this case.

B. The Regulation is Not Appropriately Tailored

The "substantial interest" test also requires some kind of meaningful examination of the fit between the government's alleged interest and the speech that has been restricted. In considering the question of the "fit" between the regulation and the government's alleged interest, the D.C. Circuit blithely concluded that "the government cannot promote its interest (protection of personal financial data) except by regulating speech because the speech itself (dissemination of financial data) causes the very harm the government seeks to prevent. Thus, the FCRA unquestionably advances the identified state interest." *Trans Union III,* 267 F.3d. at 1142.

To begin with, this neglects that fact that the speech that will be suppressed by the FTC's regulation is *not* merely the lists of names and addresses that Trans Union would have transmitted to other businesses. In many cases, it will include the speech that those businesses would have then transmitted to consumers using the lists. Of course, other lists might be available. But, also in addressing whether an opt-in regulation violated free speech rights, the Tenth Circuit has noted that the availability of alternatives to targeted marketing using the restricted lists do not traditionally justify the suppression of speech *U.S. West*, 182 F.3d at 1232.

The D.C. Circuit's opinion seems to be based on the notion that the "privacy interests" that Congress may have been protecting are legitimate no matter how broadly they may sweep. *But in a first amendment challenge to the regulation in question, it is the very legitimacy of those interests that is in question.* Of course a regulation will appear to be "narrowly tailored" if the government interest it furthers is defined as suppressing the information in question entirely. But that type of reasoning neglects a serious inquiry into the nature and legitimacy of the government's alleged interest, and a failure to understand the regulatory alternatives.

One regulatory alternative, barely mentioned by the D.C. Circuit, is an "opt-out" regime, under which consumers that do not wish to have their information shared may "opt-out" of doing so. In considering Trans Union's appeal, the D.C. Circuit dismissed "opt-out" as only marginally different from opt-in, which is simply wrong. Opt-out is much less restrictive; an empirical trial by U.S. West showed that the compliance costs of opt-in and the annoyance it offers customers mean that it operates as a virtual prior restraint in most contexts. U.S. West, one of the few businesses in the U.S. to operate under an opt-in system, found it cost $30 per customer contacted to obtain a consent, and required an average of 4.8 calls to each household before the company reached an adult who could grant consent.[9] For this reason, opt-in can be much more intrusive than opt out. The D.C. Circuit was also wrong in believing that Congress had considered and rejected opt-out, as petitioner Trans Union notes in its brief. Brief of Petitioner Trans Union, at 29, n.15. But there are other alternatives as well, including mandating

[9] Coalition for Sensible Public Records Access, *The Limits of Opt-In*, at *http://www.cspra.org/* (accessed February 18, 2002).

the use of a fulfillment house that keeps consumer's information confidential,[10] a simple requirement that consumers be given notice, and so on.

In short, the Circuit Court should have followed Supreme Court opinions of recent years recognizing the value of economic and commercial speech, many of which are cited in petitioner's brief. The D.C. Circuit should have taken its obligation to inquire into the constitutionality of this restriction seriously. Because it did not, the Supreme Court ought to take this opportunity to offer guidance to the lower courts on this issue.

III. DOES THE VALUE OF THE USE OF A LIST OF NAMES AND ADDRESSES USED IN TARGETED MARKETING TO CONSUMERS AND BUSINESSES MEAN THAT THE FTC'S SPEECH RESTRICTION SHOULD BE SUBJECTED TO STRICT SCRUTINY, ALTHOUGH IT IS AKIN TO COMMERCIAL SPEECH?

Over the years, this Court has taken significant steps towards recognizing that commercial speech does indeed have meaning and value in people's lives, value that makes it worthy of significant first amendment protection. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Ibanez v. Florida Dept. of Bus. and Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.*, 514 U.S. 476

[10] A fulfillment house stands between a purveyor of lists and the business that wishes to use the list; the purveyor generates the list according to the criteria desired by the business (a list of first-time home buyers, for example). The fulfillment house takes the list and uses it to label mailing envelopes, which it fills with the business's marketing information. It then mails the envelopes. The business does not see the list; it learns the names and addresses of consumers after the mailing only if those consumers respond to its marketing message. Fulfillment houses are widely used in marketing already.

(1995). The Court has recently ruled that a total ban on commercial speech is subject to heightened scrutiny *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 495 (1996).

The D.C. Circuit's opinions in *Trans Union II* and *III* below hint at the possibility that Trans Union's communications could have been treated as "commercial speech" rather than "private speech." This is a possibility. Although the communications of marketing lists between businesses is not itself advertising, the lists are often ultimately used in contacting consumers for marketing purposes. Note, though, that the lists may also be used for other purposes, such as disseminating political speech or requests for charitable donations. The Court thus would not be entitled to automatically assume that the speech in this case is "commercial speech."[11] It would be of value to the lower courts for this Court to explore this issue further.

Even if this Court were to find that some of the uses of the information are so closely related to commercial speech as to fall within that category, the Court should also ask whether this type of restriction on this type of speech should be treated with heightened scrutiny. As we discuss in Section II B. above, the opt-in restriction is for practical purposes a ban on the use of the speech in question, like the regulation in *44 Liquormart*. And the speech in this case is unquestionably of value. Its vanishing from the realm of shared information will make a difference—perhaps a difficult-to-measure difference, but a difference none-the-less, in how people live their lives.

The speech that Trans Union wishes to communicate is of substantial value to consumers as well as to businesses. These names and addresses can be used to send offers of new goods and services, discounts and special offers, to millions of people. Economists once believed that marketing and

[11] Singleton, XI Fordham Intell. Prop. Media & Ent. L.J. at 134-40.

advertising were essentially wasteful activities that manipulated consumers into buying goods that they did not really need. But research has since shown that marketing enhances competition; when advertisers are active, consumers enjoy lower prices and better quality products.[12] While each advertiser's individual "pitch" may be biased, consumers benefit and learn from the plethora of messages as a whole, in the same way that judges learn about a case from hearing each attorney's side of the issue.

This case would be an excellent occasion for the Supreme Court to explore further the idea that some restrictions on truthful commercial speech are entitled to heightened first amendment scrutiny.

[12] *See generally* John E. Calfee, *Fear of Persuasion: Advertising and Regulation* (1997)(describing empirical studies of the benefits of advertising for consumers).

CONCLUSION

Simply put, this is a case that involves a restriction on the communication of truthful information between legitimate businesses, a restriction imposed for no particularly good reason. CEI submits that certiorari should be granted in this case, and that the Supreme Court should take this opportunity to confine the mischievous "private speech" doctrine to its proper bounds, as well as clarifying the constitutional status of the communications of truthful information about consumers between businesses.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* THE PROGRESS AND FREEDOM FOUNDATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE* THE PROGRESS AND FREEDOM FOUNDATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Progress & Freedom Foundation ("PFF") is a non-profit research and educational institution, as defined by the Code of the Internal Revenue Service, 26 U.S.C. § 501(c)(3).[1] The foundation's principal mission is studying the impact of the digital revolution and its impact on public policy. In this

[1] The consent of the parties to the filing of this *amicus curiae* brief has been obtained and is filed with the Clerk of the Court. Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

capacity, it conducts research in fields such as electronic commerce, telecommunications, and the impact of technology on government, society, and economic growth.

PFF's interest in this case stems from the work it has done in the First Amendment area primarily in connection with its Communications Policy Studies program and in the privacy area in connection with its ongoing project, "Regulating Personal Information: Balancing Benefits and Costs." Among many other writings, PFF's senior fellows have filed comments before the Federal Communications Commission urging the agency to respect the First Amendment interests at stake in the agency's regulatory actions,[2] and they have recently authored two books examining various privacy related issues.[3] A PFF senior fellow testified in March 2001 before a congressional committee on the subject of "Privacy in the Commercial World."[4]

The issues presented in this case concerning the lawfulness of the Federal Trade Commission's restriction on the

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[2] *See, e.g.*, Jeffrey A. Eisenach and Randolph J. May, Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Comments of The Progress & Freedom Foundation, CS Docket No. 98-82, January 4, 2002; Jeffrey A. Eisenach, Thomas M. Lenard, and James W. Harper, Implementation of the Telecommunications Act of 1996, Reply Comments of The Progress & Freedom Foundation, CC Docket No. 96-115, November 16, 2001; Jeffrey A. Eisenach and Randolph J. May, Comments of the Progress & Freedom Foundation, Public Interest Obligations of TV Broadcast Licensees, MM Docket No. 99-360, March 27, 2000.

[3] *See* Paul H. Rubin and Thomas M. Lenard, PRIVACY AND THE COMMERCIAL USE OF PERSONAL INFORMATION (Kluwer Academic Publishers 2001); Alan Charles Raul, PRIVACY AND THE DIGITAL STATE: BALANCING PUBLIC INFORMATION AND PERSONAL PRIVACY (Kluwer Academic Publishers 2001).

[4] *See* Testimony of Paul H. Rubin before the House Committee on Commerce, Subcommittee on Commerce, Trade and Consumer Protection, March 1, 2001.

dissemination of target market information, therefore, are of interest to PFF because of their importance in establishing the proper balance between protection of free speech under the First Amendment and protection of privacy interests. As explained below, PFF supports grant of Trans Union LLC's petition for certiorari because it believes the D.C. Circuit's decision affirming the Federal Trade Commission's speech ban unwarrantedly inflicts too much damage on traditional First Amendment jurisprudence in the name of protecting privacy.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the lawfulness of a Federal Trade Commission ("FTC") order determining that target marketing lists sold by petitioner Trans Union to its customers are "consumer reports" under the Fair Credit Reporting Act and, therefore, could no longer be disclosed.[5] The Court of Appeals rejected Trans Union's argument that the FTC's ban on the dissemination of the lists violated petitioner's First Amendment rights. *Trans Union Corporation v. Federal Trade Commission*, 245 F. 3d 809 (D.C. Cir. 2001), *rehearing denied*, 267 F. 3d 1138 (2001).

Central to the lower court's First Amendment holding was its view that the contested speech "relates to no matter of public concern" and that, therefore, under this Court's disposition of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), such speech warrants reduced constitutional protection. 245 F. 3d at 818. In denying rehearing, the court put it bluntly: "[T]he important point is that here, as in *Dun & Bradstreet*, the targeted speech *solely* interests the

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[5] As explained in the Trans Union petition at 4, in the context of this case, the term "target marketing" involves the communication of lists of consumer names and addresses having certain characteristics. It is designed to identify a group of consumers who may be interested in a product or service. "Prescreening" is a form of target marketing designed to identify consumers who qualify for a specific credit or insurance offer.

speaker (Trans Union) and its 'specific business audience' (its customers)." 267 F. 3d at 1139 (emphasis supplied). According to the D.C. Circuit, Trans Union's First Amendment challenge should be denied because the "target marketing lists comprise speech of *purely* private concern." *Id.*

Another central underpinning of the court of appeal's decision was its conscious downplaying of the availability of less restrictive means to protect the free speech rights of Trans Union. Even assuming that this is a case in which intermediate rather than strict First Amendment scrutiny properly applies, the court gave short shrift to consideration of the efficacy of an "opt-out" mechanism as a less restrictive alternative that might serve to protect sufficiently the privacy interest the government is seeking to protect.[6]

In its principal decision, the court of appeals simply stated, incorrectly we believe, that: "Because the FCRA is not subject to strict First Amendment scrutiny, however, Congress had *no* obligation to choose the least restrictive means of establishing its goal." 245 F. 3d at 809. In its rehearing decision, the court seemed to back away somewhat from its initial position that, even under intermediate scrutiny, the government is not obliged to choose narrowly tailored means to achieve its governmental objective. Nevertheless, it brushed off without serious analysis the benefits and costs of the less restrictive opt-out alternative. It did so based on its view that Congress "apparently believes" that consumers are more willing to reveal personal information in return for guaranteed offers of credit and insurance than with regard to

[6] "Opt-out" refers to a default rule for use of information under which the information disseminator has the right to use an individual's information unless he or she requests that it not be used. "Opt-in" refers to a default rule under which an individual must affirmatively consent to have his or her information disseminated.

other types of target marketing offers and that, therefore, opt-out is sufficiently protective of privacy with regard to credit and insurance offers but not other types of target marketing.[7]

No one disputes that recent advances in technology have reduced the costs of gathering, storing, manipulating, and disseminating information. It is also generally acknowledged that these technological advances have heightened concerns on the part of many about the information being collected, how it is being used, and who has access to it. These privacy concerns have led to a number of new government restrictions on the use and dissemination of personal information, and more such privacy laws and regulations are proposed all the time. In the context of these calls for more government-imposed information dissemination restrictions in the name of privacy, it is easy to forget, as Professor Eugene Volokh put it so well, that: "[T]he right to information privacy—my right to control your communication of personally identifiable information about me—is a right to have the government stop you from speaking about me."[8]

The Court should grant the Trans Union petition to ensure that First Amendment interests receive proper protection in this era in which courts increasingly will confront cases involving speech regulation in the name of privacy. To be sure, it will be necessary in these cases to balance the speaker's First Amendment rights in disseminating information against the government's interest in protecting privacy. By deciding this case, the Court can affirm the

[7] 267 F. 3d at 1142. The Fair Credit Reporting Act, 15 U.S.C. §§ 1681b(e); 1681m(d)(1), provides that a consumer may opt-out of credit and insurance target marketing.

[8] Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People Speaking About You*, 52 STAN. L. REV. 1049, 1050-51 (2000).

vitality of certain fundamental First Amendment principles in the face of what are likely to be more frequent attempts to regulate information dissemination under the privacy rubric.

In particular, from PFF's perspective as a research and educational foundation with experience in both the privacy and First Amendment areas, the Court should take this case to correct the D.C. Circuit's view that the targeted marketing at issue is speech of "purely private concern." This view misunderstands the role such speech plays in furthering the larger public interest in an efficiently functioning free marketplace. And the Court should correct the D.C. Circuit's view that it need not evaluate substantively more narrowly tailored forms of speech regulation if privacy concerns are offered as justifications for such regulation. In the Argument below, we address these two points at greater length.

ARGUMENT

I. THE TARGET MARKETING AT ISSUE IS NOT SPEECH OF PURELY PRIVATE CONCERN

As explained above, relying on the plurality opinion in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, the court of appeals accorded petitioner's target marketing speech "only qualified constitutional protection" on the basis that it was of "purely private concern." 267 F. 3d at 1139. PFF agrees with petitioner that the diminished First Amendment protection that the plurality accorded the credit report in the *Dun & Bradstreet* defamation context appears largely to have rested on the fact that the information was "wholly false" and "was made available to only five subscribers, who, under the terms of the subscription agreement, could not disseminate it further." 472 U.S. at 762. There is no intimation that the

target marketing speech at issue in this case contains "wholly false" information, so *Dun & Bradstreet* is distinguishable on that basis alone.[9]

Even assuming the validity of the public/private distinction, however, the D.C. Circuit was wrong to characterize the speech at issue here as of purely private concern. It is not true, as the D.C. Circuit claims, that "the targeted speech solely interests the speaker (Trans Union) and its 'specific business ... e' (its customers)." 267 F.3d at 1139. Without warrant, this view denigrates the public interest served by target marketing in today's information economy.

The speech in this case is of public concern because society at large benefits significantly from the targeted advertising that is restricted by the government's ban on information dissemination. Foremost, targeted advertisements provide consumers with valuable information. As PFF senior fellows Paul Rubin and Thomas Lenard explain in their recently published book, *Privacy and the Commercial Use of Personal Information*:

> The modern theory of advertising indicates that most or all advertising provides valuable information, and if advertising leads to sales then at least some subset of consumers is benefiting from the advertising. Even if some information does not lead directly to a purchase, the information may still be valuable to the consumer. For example, it may better enable the consumer to compare prices among products, or to determine what products are available.[10]

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[9] In any event, making First Amendment protection dependent upon whether the speech is of "public" or "private" concern is problematical because of the difficulty of drawing such a "slippery slope" distinction. *See* Eugene Volokh, *supra* note 8, at 1088-1105.

[10] Rubin and Lenard, *supra* note 3, at 23. See also, Carl Shapiro and Hal R. Varian, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY (Harvard Business School Press 1999).

Moreover, the information used for targeted advertising enables recipients of advertisements to avoid the nuisance of receiving unwanted ads that are of no interest to them and allows marketers to avoid the expense of sending unwanted ads. Rubin and Lenard explain that: "[B]oth consumers and advertisers have incentives to more accurately target messages. Consumers gain because they receive fewer unwanted messages, and advertisers gain because consumers pay more attention to their messages."[11] Put simply, "[a]partment dwellers don't want information about aluminum siding, for example, and childless couples don't need to learn about infant formula specials."[12] By enabling businesses to reach the "right" customers, targeted advertising substantially reduces the cost of direct marketing, thereby allowing businesses to offer their products at lower prices than otherwise would be the case.[13] Conversely, any regulation that raises the costs of advertising and of obtaining customer lists makes it more difficult for new entrants to compete and adversely affects competition.[14]

At bottom, and most fundamentally, the information dissemination restrictions at issue here are not "of purely private concern" because their imposition has substantial adverse societal impacts. One of the most important characteristics of information, in terms of its contribution to the nation's economic welfare, is that the same information can be used productively in different ways at different times by different parties. In other

[11] Rubin and Lenard, *supra* note 3, at 23.

[12] *Id.*, at xii.

[13] *Id.*, at 11. Rubin and Lenard assert that positive externalities result from better targeting in the sense that recipients of unwanted messages not only hold the sender accountable but, due to a "spillover" effect, hold other sellers accountable as well. Thus, every time an unwanted message is received, the expected value of future messages is reduced and consumers are more likely to ignore all unsolicited messages. *Id.* at 33.

[14] *Id.*, at 78-79.

words, once the initial costs of gathering and organizing information are incurred, multiple uses can be made of the same information at a relatively low marginal cost.[15] This multiple use characteristic is an important source of economic value, and, to the extent that governmental restrictions diminish or make more costly the ability to take advantage of this "public good" aspect of information, the economic welfare of the public at large suffers.

More specifically, as Rubin and Lenard explain, if some of the information collected for the purpose of making credit or insurance decisions can be sold to third parties, such as marketers, the value of the information is increased, thereby creating incentives to increase the amount of information available. This "positive externality" effect means that not only will the credit and insurance markets function better, but so will the market for other types of information as well.[16]

In the seminal case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), this Court affirmed that, because of its importance to the public, commercial speech in the form of advertising is entitled to First Amendment protection. There, the Court emphasized that:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that

[15] *Id.*, at 24. Carl Shapiro and Hal R. Varian explain that: "Information is costly to *produce* but cheap to *reproduce*. . . . Economists say that production of an information good involves *high fixed costs* but *low marginal costs*. The cost of producing the first copy may be substantial, but the cost of producing (or reproducing) additional copies is negligible." Carl Shapiro and Hal R. Varian, *supra* note 10, at 3. (Emphasis in original).

[16] Rubin and Lenard, *supra* note 3, at 32-33.

those decisions, in the aggregate, be intelligent and well-informed. To this end, the free flow of commercial information is indispensable.[17]

In the same vein, the Court reminded that it is well to appreciate that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." 425 U.S. at 770. The Court should grant the Trans Union petition because the court of appeal's decision presents important issues concerning whether the channels of communication in our free enterprise economy will be unnecessarily and unreasonably closed off in a way that harms the public interest.

II. THE D.C. CIRCUIT FAILED TO CONSIDER THE MORE NARROWLY TAILORED OPT-OUT FORM OF SPEECH REGULATION

While commercial speech may be subject only to intermediate scrutiny under the First Amendment, the government still must demonstrate that its regulation "is not more extensive than is necessary to serve" the asserted governmental interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). In other words, the government must show its interest could not be served "by a more limited restriction on commercial speech." 447 U.S. at 564.[18] In practical terms, this means that the government must demonstrate that it has "carefully calculated the costs and benefits associated with the burden on speech imposed by its prohibition." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993).

[17] 425 U.S. at 765.

[18] *See also, Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173, 174 (1999).

In this case, the court of appeals concluded that "there is no possibility that some less-restrictive or nonspeech-related regulation could achieve the identified [government] interest" without undertaking a serious analysis of more tailored alternatives. 267 F. 3d at 1141. The court dismissed the less restrictive alternative of a consumer opt-out mechanism without showing any real appreciation of the public interest trade-offs between opt-in and opt-out mechanisms. The court thought it enough merely to assert that: "Congress apparently believes that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sales pitches." *Id.*, at 1142.

In its petition, Trans Union disputes the court of appeal's assertion that Congress itself rejected the use of opt-out for target marketing.[19] In any event, petitioner maintains that the specific personal information relating to prescreened credit and insurance offers authorized to be disseminated under the Fair Credit Reporting Act poses a greater threat to privacy than the information used for other types of target marketing, so that if opt-out is sufficiently protective of privacy for prescreening it should be for target marketing as well.[20]

PFF agrees that the privacy interests at stake with regard to target marketing are less than for presceening because information used for target advertising is generally used anonymously. Rubin and Lenard explain that advertisers typically are not interested in data about individuals *per se*. Rather "they purchase data about blocks of individuals who share a set of attributes." [21] A seller of automobiles does not

[19] *See* Trans Union Petition, at 26

[20] Trans Union Petition, at 26-27. Trans Union points out that even with regard to prescreening for credit or insurance offers the FTC has concluded that "there is relatively insignificant harm to the consumer because the privacy infringement is minimal in prescreening." *Id.*, citing 55 Fed. Reg. 18804, 18807 & n.14 (II 4)(May 4, 1990.)

[21] Rubin and Lenard, *supra* note 3, at 24.

ask, "What can I sell to individual X?" Instead, it asks an advertising agency to use information databases to help it target market to Y number of individuals who (by virtue of some attribute such as the age of their current vehicle) are more likely than average to be interested in considering the purchase of a new car.[22] Thus, target marketing is likely to be minimally invasive of individual privacy interests, and less invasive than prescreening for credit and insurance offers that is more dependent upon personal information.

In rejecting the less restrictive opt-out alternative, the D.C. Circuit gave virtually no weight to the societal costs imposed by requiring opt-in rather than opt-out. As Rubin and Lenard explain in their new book, because the great majority of consumers accept whatever method is used as the default, an opt-in requirement "dramatically reduce[s] the amount of information available to the economy and impose[s] substantial costs on consumers."[23] They cite recent testimony before the FTC to the effect that when the default was opt-in, 85% of consumers chose not to provide their data, whereas when the default was opt-out 95% chose to provide information.[24]

The costs imposed on society by forcing opt-in as the default method are substantial. For example, Michael A. Turner has estimated that opt-in requirements would reduce the information available to catalog and Internet apparel retailers at a cost of $1 billion in a $15 billion market. According to Turner, this $1 billion "information tax" would result in retailers passing on increased costs ranging from 3.5

[22] *Id.*, at xiii.

[23] *Id.*, at xxi.

[24] *Id.*, at xxi, n.19, citing Testimony of Parry Ponemon, Price WaterhouseCoopers, at FTC Hearing, "Wireless Web, Data Services and Beyond: Emerging Technologies and Consumer Issues," December 12, 2000, Vol. 2, p. 232.

to 11 percent.[25] In a study released in January 2002, Turner and Lawrence G. Buc estimated the impact of adoption of opt-in restrictions on charitable organizations. They calculated that "should an 'opt-in' style third party data restriction become law, administrative costs for charitable organizations would increase by 30 percent, and would force charities to spend 53 cents to raise a dollar of donations due to the lower response rates."[26] According to Turner and Buc, with an opt-in restriction as law, approximately $16.5 billion currently allocated to charitable programs will be spent on additional marketing costs."[27]

And in yet another recent study, Peter A. Johnson and Robin Varghese examined the impact of opt-in restrictions in California for only the financial services, charitable organizations, and non-store retailing sectors. They concluded that such restrictions on data sharing "would likely cost California consumers, employees, and taxpayers, several billion dollars" and "cost California charities $1.57 billion in revenue lost to programs."[28] Clearly, the costs imposed on society by requiring that opt-in rather than opt-out be used are very substantial if measured solely in economic terms. Viewed more broadly, the societal losses are also real, even if less

[25] Michael A. Turner, Executive Director, Information Services Executive Council of the Direct Marketing Association, "The Impact of Data Restrictions on Consumer Distance Shopping," at 7, available at *http://www.the-dma.org.isec9.pdf*, posted in March 2001.

[26] Michael A. Turner, Executive Director, Information Services Executive Council of the Direct Marketing Association, and Lawrence G. Buc, President, SLS, "The Impact of Data Restrictions on Fundraising for Charitable & Nonprofit Institutions," January 2002, at 4.

[27] *Id.*

[28] Peter A. Johnson, Adjunct Professor, School of International and Public Affairs, Columbia University, and Robin Varghese, Graduate School of Arts and Sciences, Columbia University, "The Hidden Cost of Privacy: The Potential Economic Impact of 'Opt-In' Data Privacy Laws in California," January 24, 2002, at 2.

readily economically quantifiable, for example, when charitable organizations are forced to curtail core programmatic activities in order to devote more resources to raising funds under opt-in regimes than would be required under the opt-out alternative.

The cursory treatment that the D.C. Circuit gave to the question whether a more narrowly tailored regulation would satisfy the government's interest stands in stark contrast to the Tenth Circuit's consideration of this question in *U.S. West, Inc. v. United States*, 182 F. 3d 1224 (10th Cir. 1999), *cert. denied*,120 S. Ct. 2215 (2000). In *U.S. West*, the court vacated a Federal Communications Commission order that mandated an opt-in mechanism before telephone companies could disclose their customers' information for marketing purposes. While assuming for the sake of argument that the agency's regulation served a substantial government interest in protecting privacy, the court invalidated the restriction because "the FCC's failure to adequately consider an obvious and substantially less restrictive alternative, an opt-out strategy, indicates it did not narrowly tailor" the regulation. 182 F. 3d at 1238-39. The court said the agency's speculation that "there are a substantial number of individuals who feel strongly about their privacy" is not enough to pass constitutional muster; rather in light of the free speech rights at stake, the government must "show that an opt-out strategy would not sufficiently protect customer privacy." *Id.*, at 1239.

In the present case, the D.C. Circuit was content to rely on what it (assertedly mistakenly) understood to be Congress's rejection of the opt-out method for target marketing other than prescreened credit or insurance offers, rather than engaging in the type of more substantive analysis performed by the Tenth Circuit in the *U.S. West* case and required by the First Amendment. As we enter an era in which there almost certainly will be an increasing number of clashes between

privacy and free speech interests, the Court should review this case because the court below failed to consider substantively whether, on balance, a less restrictive regulation would suffice to satisfy the government's privacy objective.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TRANS UNION LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* OF THE INFORMATION SERVICES EXECUTIVE COUNCIL OF THE DIRECT MARKETING ASSOCIATION

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2788

QUESTIONS PRESENTED

I. Whether Trans Union's speech (truthful lists of selected names, addresses, and other information regarding consumers also known as target marketing lists) relates to matters of only private concern such that the speech at issue is subject to reduced First Amendment protection under *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985)?

II. Whether an administrative ban on speech (opt-in requirement for dissemination of consumers' names and addresses on Trans Union's target marketing lists pursuant to the Federal Trade Commission's decision that they were "consumer reports" pursuant to the Fair Credit Reporting Act) satisfies intermediate scrutiny in the absence of any evidence that it is narrowly tailored to an important governmental interest?

The parties' written consent to the filing of this brief has been filed with the Clerk of Court. No counsel for a party authored this brief in whole or part nor did any party make a financial contribution in preparation or execution of this brief of *amicus curiae.*

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INTEREST OF *AMICUS CURIAE*

The Information Services Executive Council (ISEC) is an industry segment group of The Direct Marketing Association (The DMA), which is the largest trade association for businesses interested in interactive and database marketing, with over 5,000 corporate, nonprofit, and individual members, including Trans Union LLC (TU). Among the service industries within the direct marketing industry are the Information Service Providers (also information aggregators), of which Trans Union is one. Information Service Providers are represented within The DMA through ISEC. Since its inception, ISEC's primary mission has been to promote and advance the responsible use of information, balancing the legitimate concerns for individual privacy with the practical necessity of access to information in the New Economy.

The case of *Trans Union LLC v. Federal Trade Commission* is of particular interest to amicus curiae, because the Federal Trade Commission's ban on Trans Union's speech restricts the use of non-sensitive commercial information for marketing purposes and therefore restricts the direct marketing industry as a whole, as well as the business model of ISEC members in particular. As will be explained more fully below, the 5,000 plus members of The DMA are extraordinarily dependent on the free flow of information organized through information aggregators for providing solicitations, raising donations, and providing customer service to millions of Americans. Impediments to the free flow of non-sensitive core marketing data -- such as those placed upon Trans Union in this case, and other information aggregators by extension -- impose undue additional marketing and administrative costs upon the entire direct marketing industry, resulting in higher prices for consumers, lower quality of customer service, diminished social services from charities, and fewer jobs. ISEC and The DMA have a harmony of interests with the general public in promoting the re-

sponsible use of non-sensitive marketing data to the benefit of the economy and the consumer alike.

Information aggregators such as Trans Union LLC play a key role in the direct marketing industry because they collect, improve, and repackage the vast amounts of information upon which the direct marketing industry relies. Indeed, the marketing of goods and services through targeted, information-based solicitation is the feature which most clearly distinguishes the direct marketing industry from the general (non-targeted) marketing or advertising industry.

The information used by TU, and thus the direct marketing industry, originates from a wide range of sources, and much of it is already in the public domain. TU, like other information aggregators, uses this information to construct lists of consumers possessing certain attributes which a client party believes desirable to target for a particular solicitation. For example, such a list might contain individuals whose age characteristics indicate a likelihood to purchase a particular product or service relevant to that characteristic (such as early-retirement financial services). These lists are purchased directly by organizations that engage in direct marketing (including non-profits or political parties) or purchased indirectly through list brokers who act as middlemen. The nature and purpose of each communication (each list) vary widely, depending on the needs of Trans Union's clients. These purposes include, but are not limited to, commercial activities, charitable fund-raising, and political solicitation and communication. In sum, information aggregators like TU are the indispensable hub within the direct marketing industry for the dissemination and communication of the information essential to the distinctive direct marketing industry.

INTRODUCTION & SUMMARY OF ARGUMENTS

The particular speech at issue in this case takes the form of lists of selected names and addresses of individuals originating in part from what Amicus Curiae regards as non-sensitive information contained in so-called "credit headers" (so called because this information is placed at the top of a credit report, though it contains no sensitive financial information).

In applying the Fair Credit Reporting Act (FCRA or Act), the Federal Trade Commission's (FTC) regulation determined that Trans Union's target marketing lists containing names and addresses of individuals gathered from credit headers nevertheless constituted "consumer reports" under the Act, not withstanding the record, and thus found communication of it impermissible. The FTC therefore prohibited Trans Union from selling the lists without the expressed permission of each individual on that list. This imposed an "opt-in" (i.e., highly restrictive affirmative consent) requirement on this information, despite the evident intent of Congress to impose a less restrictive "opt-out" requirement as reflected in another federal statute that similarly aims to promote the governmental interest in protecting people's financial information, the Gramm-Leach-Bliley Financial Services Modernization Act (GLBA), 106 Pub. L. No. 102, Stat. 1338, tit. V (1999) (codified at various sections of 15 U.S.C.).

The impact upon Trans Union from this administrative ban is that it severely restricts TU's ability to communicate information in its target marketing lists unless it obtains permission from the millions of individuals whose names are currently stored in its database.

As will be shown more fully below, the extreme cost and impracticality of the opt-in requirement amounts to a blanket prohibition on Trans Union's communication of this information. Within the universe of information, credit-header data is particularly

crucial to direct marketing. Because individuals have a greater incentive to update their non-sensitive data (particularly their address or contact information) with their financial service providers than they do with almost any other agency, credit header information is regarded by direct marketers as probably the most accurate source of the name and address data necessary to accurately market their goods and services. In practice, the FTC's ban could potentially prohibit the dissemination of almost every name and address of individuals in Trans Union's database, with corresponding denial of these lists to direct marketers.

For the reasons stated below, we ask the Supreme Court to hear Trans Union's Petition for Writ of Certiorari:

1. The D.C. Circuit Court erred in its factual assumption that Trans Union's lists of selected names and addresses of individuals (also known as target marketing lists) were "solely in the individual interest of the speaker and its specific business audience" thus deserving reduced Constitutional protection. *Trans Union II*, 245 F.3d 809, 818 (quoting *Dun & Bradstreet*, 472 U.S. 749, 762 (1985)). Unlike the speech at issue in *Dun & Bradstreet, Inc. v. Greenmoss Builder, Inc*, which involved a matter of only private concern, *amicus curiae* asks the Court to recognize the speech at issue in this case, Trans Union's target marketing lists, involves a matter of important public concern.

Contrary to the Circuit Court's decision, TU's communication of information contained in its target marketing lists concern a matter of immense public importance. The threatened negative economic impact from restricting the use and communication of information via the FTC's opt-in regime is both broad and substantial. Not only does this ban threaten direct marketing's important role in the national economy, it threatens to remove substantial economic efficiencies and ease of service enjoyed by consumers. It also

threatens the economic viability of non-profit organizations (including charities and political entities) and the United States Postal Service (USPS).

2. Moreover, the D.C. Circuit Court misapplied *Dun and Bradstreet* in this case, because the facts presented in *Dun and Bradstreet* are distinguishable. Whereas *Dun and Bradstreet* is a defamation case, involving the dissemination of false and harmful information about one company to only five people, the speech at issue in this case involves accurate, lawfully obtained information that poses no harm. Also, the former involves sensitive financial information whereas the latter involves non-sensitive information.

3. The Circuit Court erred in its application of intermediate scrutiny, because the Fair Credit Reporting Act is not narrowly tailored to the substantial governmental interest in protecting personal financial data. Trans Union's "underinclusiveness" challenge merits special attention, because the FCRA permits target marketing for offers of credit and insurance, subject to choice by consumers to opt-out, whereas target marketing for other purposes are subject to an opt-in requirement. *See* 15 U.S.C. § 1681(c)(1)(B)(i). Evidence establishes that information that is communicated by TU for ultimate use in target marketing for prescreening offers for credit and insurance ("prescreening") is more invasive of an individual's privacy than information that is communicated for use in target marketing for other purposes, such as for goods and services. *See* 55 Fed. Reg. 18804, 18807 & n. 14 (II 4) (May 4, 1990). Therefore, the threat to privacy from target marketing for other purposes is less significant than for prescreening. Thus, subjecting non-sensitive data to a more stringent set of requirements than already imposed on more sensitive data is a non sequitur.

Further, the FTC's administrative ban fails narrow tailoring requirements, because it subjects target marketing lists for other purposes to opt-in requirements, although the information communicated to

third parties is non-sensitive in comparison to the more sensitive nature of information disclosed to third parties for the purpose of prescreening pre-approved offers for credit and insurance. Contrary to the Circuit Court's opinion, the government can promote its interest (protection of personal financial data) via a less restrictive means by distinguishing what is sensitive financial information from what is non-sensitive information and in balancing consumer's privacy with the benefits of the free flow of information.

4. The D.C. Circuit Court erred in its application of intermediate scrutiny, because it failed to consider the fact that an opt-out requirement is a substantially less restrictive means of limiting Trans Union's speech than the "opt-in" requirement for the disclosure of consumer information in Trans Union's database.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY EXPANDING *DUN & BRADSTREET* TO CREATE A "NO MATTER OF PUBLIC CONCERN" STANDARD TO TRUTHFUL, LAWFULLY OBTAINED SPEECH SUBJECT TO DIMINISHED FIRST AMENDMENT PROTECTION.

A. The D.C. Circuit Court Erred In Its Factual Assumption That Information Communicated In Trans Union's Target Marketing Lists Were Only of Private Concern.

The Appellate Court erroneously presumed that information communicated in Trans Union's target marketing lists was only of a private concern. In fact, the limitation on this form of speech is a matter of immense public importance, considering that fact that the target marketing industry generates enormous benefits to the public and the to U.S. economy. Unlike the speech presented in the case of *Dun & Bradstreet, Inc. v. Greenmoss, Inc.* which was only a matter of pri-

vate concern, TU's communication of information in its target marketing list involves a matter of public concern and importance. *See* 472 U.S. 749 (1985). In *Dun & Bradstreet*, the speech involved took the form of false statements in a credit report that was disseminated by a credit reporting agency to five subscribers indicating that a company had filed for bankruptcy. The credit report was false and grossly misrepresented the company's assets and liabilities. *Id.*

The Court held that a consumer reporting agency's false credit report deserved only qualified constitutional protection, because the report concerned no public issue. *Id.* at 762. The Court based its conclusion, reasoning that the report constituted "speech solely in the individual interest of the speaker and its specific business audience," and that the report reached only "five subscribers, who, under the terms of the subscription agreement, could not distribute it further." *Id.* Accordingly, the D.C. Circuit Court held that Trans Union's speech could be prohibited under intermediate scrutiny because it "relates to no matter of public concern." *Trans Union III*, 267 F.3d 809, 818 (2001).

On the contrary, TU's communication of information in its marketing list does relate to matters of public concern. The Court has held that "[w]hether . . . speech addresses a matter of public concern must be determined by the [expression's] content, form, and context . . . as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-148 (1983).

Trans Union's sale of its target marketing list involves more than merely a commercial transaction. The information in TU's target marketing lists is communicated to and is utilized by varying types of organizations for wide variety of purposes. This information is then used by the third party organization to make further solicitations to contact potential customers, generate public interest or support, recruit or solicit members, or to fulfill other socially beneficial

and productive needs of the entity and of the public. It not only benefits the organization or company using the information to fulfill its purpose and mission, it allows the ultimate recipient of the communication (the consumer, donor, citizen, etc.) to learn more about a product, service, or opportunity. It short, this communication is of benefit to consumers and to the public.

For example, nonprofit and charitable organizations rely heavily on information communicated by information aggregators such as TU in the form of target marketing lists. They use this information to identify the pool of likely donors from within the general population. This allows them to use more cost effective direct mail or telephone solicitation campaigns rather than resorting to inefficient mass mailing or random calling. Similarly, political groups benefit by targeting individuals who are likely to vote for them or would be interested in receiving their solicitations. Additionally, the USPS is a major beneficiary of list-dependent direct mail marketing, which comprises nearly half of its mail volume.[1]

Also, empirical evidence shows that if affirmative consent restrictions were placed on the flow of non-sensitive marketing information, this restriction would likely amount to a de facto hidden tax on the large number of Americans who shop at a distance. For example, a recent study showed that individuals who buy apparel through catalogs would face cost increases ranging from 3.5. to 11 percent if an opt-in privacy requirement were imposed.[2] Findings from this study show that consumers living in economically disadvantaged inner city areas and those living in rural areas will be disproportionately affected by the restriction on the dissemination of non-sensitive marketing information. Such consumers are either underserved by traditional brick-and-mortar companies or live further away from the nearest major retail shopping malls. *See Id.* at 27-37. This argument will be elaborated upon in the last section that touches upon the negative economic impact of the more restrictive opt-in regime.

[1] The Direct Marketing Association, STATISTICAL FACT BOOK, p. 277 (24th ed., 2001).

[2] Michael A. Turner, Ph.D., THE IMPACT OF DATA RESTRICTIONS ON CONSUMER DISTANCE SHOPPING (March 2001). This study was sponsored by the Privacy Leadership Initiative (The PLI) and the Information Services executive Council (ISEC). It is available at www.understandingprivacy.org.

Moreover, direct marketing creates jobs, and equally as important, direct marketing and the databases that power such advertising campaigns level the playing field for companies of all sizes, increasing competition and driving the U.S. economy. For consumers, this brings greater choice, lower prices, and greater opportunity.

In 2001, total gross annual revenue generated by companies engaged in targeted direct marketing exceeded $1.9 trillion. The national sales revenue generated by direct marketing in 2001 to consumers amounted to approximately $1 trillion, representing about 13.5% of total U.S. consumer sales. Additionally, nearly 15.6 million workers were employed in the direct marketing industry in 2001.[3] And, over 79 million consumers made purchasing decisions from direct marketing advertisements, a figure which represents more than 40 percent of U.S. consumers.[4]

Finally, the use of accurate information by the direct marketing industry actually decreases the proportion of undesired direct mail. With the use of correct names and addresses in a target marketing list derived from credit headers, along with other relevant predictive information, companies and organizations can target their communications to individuals who may be more interested in receiving the information.

[3] The Direct Marketing Association, ECONOMIC IMPACT: U.S. DIRECT MARKETING TODAY, 7th ed. (forthcoming April 2002).

[4] The Direct Marketing Association, STATISTICAL FACT BOOK, p. 5 (24th ed., 2001).

Therefore, companies and other organizations can target their audience instead of resorting to mass mailing, which is not only costly but is also inefficient.

It is noteworthy that the Supreme Court has struck down privacy-based restrictions on the publication of truthful information on matters of public concern. E.g., *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (holding that privacy concerns by the disclosure of contents of a private cellular telephone call "give way when balanced against the interest in publishing matters of public importance."); *Florida Star v. B.J.F.*, 491 U.S. 524. 533 (1989) (concluding that the government may not prevent the publication of " 'lawfully obtained information about a matter of public significance' " (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979)); *Martin v. Struthers*, 319 U.S. 141, 146-147 (1943) (striking down restrictions preventing door-to-door solicitators from approaching households that do not affirmatively invite them, recognizing that "freedom to distribute information to every citizen . . . is . . . clearly vital to the preservation of a free society.")

In *Trans Union III*, 267 F.3d 1138, 1140-1141, the Appellate Court indicates that petitioner, Trans Union, cited a number of cases in which the Supreme Court "struck down privacy-based restrictions on the publication of truthful information." Pet. at 5-6. The Appellate court erroneously distinguishes these cases cited by petitioner, reasoning that "[u]nlike this case, however, most of the cited cases involve speech on matters of public concern." *Trans Union III*, 267 F.3d 1138, 1141 (2001). On the contrary, information contained in TU's target marketing lists are a matter of public concern and of great public benefit.

Additionally, the Circuit Court erred in disregarding *Shapero v. Kentucky*, 486 U.S. 466 (1988) (striking down privacy based laws that restrict the right of attorneys to send target mail solicitations to potential clients), and *Bolgers v. Youngs Drugs Prods. Corp.*, 463

U.S. 60 (1983) (striking down prohibitions on the mailing of contraceptive advertisements on the basis that they intrude on the recipient's privacy). The Appellate Court concluded that "Trans Union's reliance on these . . . two cases is particularly misplaced, for they stand not for the principle that speech rights 'prevail' over privacy rights 'virtually without exception,' Pet. at 5, but instead for the principle that speech of largely private concern may warrant only qualified protection." *Trans Union III*, 267 F.3d 1338, 1141 (2001). We urge that the Supreme Court revisit theses cases and others without the Circuit Court's erroneous factual assumption that Trans Union's speech concerned only matters of private concern.

B. The Appellate Court Misapplied *Dun & Bradstreet* To This Case, Because the Facts and Circumstances in the Two Cases are Substantively Different – The Former Involved Harmful, Defamatory Speech Containing Sensitive Financial Information while the Latter Involved Truthful Beneficial Speech Containing Non-Sensitive Information.

The facts in *Dun & Bradstreet* are distinguishable from those in the *Trans Union* case. The speech in *Dun & Bradstreet* involved a defamatory credit report that falsely reported the assets and liabilities of a company thereby causing harm to the company. *See* 472 U.S. 749 (1985). On the contrary, the communication in TU's target marketing list consists of truthful, lawfully obtained information that poses no harm to the public. In fact as is established in Section II B of this brief, both the entities making solicitations use the information communicated to them by Trans Union and the recipients of those solicitations reap considerable benefits.

The FTC's ban involves the effective restriction of communication of all the names and addresses in Trans Union's relevant database, unless the consumer

provides affirmative consent. As a result, the accuracy of TU's data products will diminish. Each year, tens of millions of Americans move. The most accurate source of change of address information is not the United States Postal System (USPS), but rather credit header information. Because they are vested in financial institutions, consumers tend to provide such institutions with accurate, updated contact information. Loss of this rich source of accurate contact information, essential to all database marketing efforts, will result in gross inefficiencies – increased return post, increased volume of unwanted solicitations, increased marketing costs resulting in increased prices for consumers – and will reduce economic benefits currently enjoyed by a wide section of the population. As such, there exists a clear public interest in this case, distinct from the narrower interest ruled on in *Dun & Bradstreet*.

Moreover, the information contained in the referenced credit report in *Dun & Bradstreet* involves a company's sensitive financial information regarding the company's assets and liabilities, indicating that the company had filed for a bankruptcy. In stark contrast, Trans Union's target marketing list contains only non-sensitive information. In addition to simple name and address information, these lists contain data about certain attributes. For example, the fact that an individual holds a credit card, a home mortgage, or a car loan, etc. *See Trans Union II*, 245 F.3d 809, 812 (2001). TU's marketing list does not include specific account information such as balance, account number, personal identification number (PIN), or other information that, if accessed, could cause an individual harm. This type of information is of no use to direct marketers as it has no predictive value. A mother's maiden name, or PIN, for example, predict nothing about an individual's likely consumption habits.

II. THE CIRCUIT COURT ERRED IN ITS APPLICATION OF INTERMEDIATE SCRUTINY.

A. The Circuit Court Erred When it Concluded that the Fair Credit Reporting Act Was Narrowly Tailored To a Substantial Governmental Interest.

We urge the Supreme Court to apply strict scrutiny to Trans Union's speech, because the Circuit Court erred in assuming that information in TU's target marketing lists were matters of only private concern warranting less than full Constitutional protection and the FTC's attempted regulation makes a content based distinction. Under the strict scrutiny standard of review, the FTC may regulate TU's speech only if the proposed restriction on speech promotes a compelling state interest and is the least restrictive means to further the articulated interest in that there are no alternative means of furthering the governmental interest. *See Action For Children's Television v. F.C.C.*, 58 F.3d 654, 657 (D.C Cir., 1995). Under inter-mediate scrutiny, the regulation must advance a substantial governmental interest in a material way and be narrowly tailored in reaching its objective. *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

In *Trans Union III*, the Circuit Court concluded that the FTC's restrictions on the petitioner's target marketing list pursuant to the FCRA concerned no public issue and was thus subject to intermediate scrutiny rather than strict scrutiny. *See* 267 F.3d 1138-1142 (2001). Moreover, in response to TU's arguments that the FCRA makes a content based distinction, the Appellate Court held that the "notion that content based restrictions warrant strict scrutiny . . . derives from cases involving fully protected speech" and that since "Trans Union's target marketing lists are private speech warranting only qualified constitutional protection", "[w]e need not decide whether content-based re-

strictions of private speech might sometimes merit strict scrutiny." *Trans Union III*, 267 F.3d 1138, 1141 (2001) (referring to *Arkansas Writer' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) and *FCC v. League of Women Voters*, 468 U.S. 364 (1984)). However, as stated earlier, information in TU's target marketing lists are a matter of public concern and are utilized by varying types of entities for the benefit of private firms, public sector and political entities, nonprofit and charitable institutions, and the general consuming public.

Contrary to the Circuit Court's decision, the FTC's restriction on TU's ability to disseminate information in its target marketing list is unconstitutional, because it is underinclusive and makes a content based distinction. The FTC's restriction on TU's speech fails for being underinclusive, because it allows target marketing for prescreening offers of credit and insurance, subject to choice of opt-out; but, in contrast, it requires affirmative consent (opt-in) from individuals before their non-sensitive information can be disclosed for other targeted marketing purposes. *See In re Trans Union Corp.*, Opinion of the Commission, No. 9255 at 15-17 (Feb. 10, 2000) and 15 U.S.C. § 1681(c)(1)(B)(i). The appellate court erred when it held that the prescreening exception to the FCRA's general opt-in requirement did not demonstrate a lack of narrow tailoring to an important governmental interest, because it results in communication of information that is more invasive of an individual's privacy than information disclosed for other target marketing purposes. *See* 55 Fed. Reg. 18807 & n. 14 (II 4) (May 4, 1990).

Specifically, information that is required for prescreening involves the disclosure of detailed credit performance information or credit history that is more invasive of a person's privacy – for instance, whether a person pays on time and how the consumer pays his or her bills. On the other hand, target marketing lists

for other purposes require only the disclosure of names and addresses of individuals meeting certain general criteria -- for example, whether an individual merely holds a credit card, a mortgage, or a loan.

Regardless, the FTC concluded that in prescreening "there is relatively insignificant harm to the consumer because the privacy infringement is minimal" and that "any "invasion of the consumer's privacy " is "modest" when his or her credit history is being reviewed. 55 Fed. Reg. 18807 & n. 14 (II 4) (May 4, 1990). In fact, this is the only instance in the FTC record that cites a potential harm posed by target marketing.

In summary, prescreening for offers of credit and insurance is one form of target marketing, similar to target marketing for other purposes that is being restricted by the FTC. However, the FTC's administrative ban treats these similar, socially-beneficial forms of speech differently, subjecting the former to an opt-out requirement and the latter type to an opt-in. Consequently, the restriction is unconstitutional under intermediate scrutiny because it is underinclusive, and fails under strict scrutiny because it is a content-based restriction on expression and is not narrowly tailored.

Additionally, as with prescreening to offer credit or other financial service opportunities, database marketing of goods, services, and for other purposes, e.g., for charitable and political contributions, is also socially valuable. The circuit court notes that Congress singled out prescreening, noting in its opinion: "Congress apparently believes that people are more willing to reveal personal information in return for guaranteed offers of credit than for catalogs and sale pitches." 267 F.3d. 1138, 1142 (2001). By making this assertion, however, the appellate court erred in assuming what Congress "apparently" believes. It offered no real empirical evidence that Congress considered in reaching its conclusion that people are less

willingly to reveal personal information for catalogs and sales pitches than for pre-approved offers of credit and insurance. The appellate court inferred this from unspecified text and non-existent evidence.

B. The Circuit Court Erred by Rejecting Trans Union's Argument that the "Opt-out" Requirement is a Substantially Less Restrictive Means of Limiting Trans Union's Speech than an Opt-in Requirement.

Under intermediate scrutiny, the FTC's ban on TU's dissemination of its target marketing list under the FCRA violates TU's First Amendment rights to free speech, because the governmental interest in protecting personal financial information can be promoted by choosing a less restrictive means of doing so, namely via an opt-out approach. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), Justice O'Connor stated in her concurring opinion: "[t]he availability of less burdensome alternative to reach the stated goal signals that the fit between the legislature's ends and means chosen to accomplish those ends may be too imprecise to withstand First Amendment scrutiny."

Under an opt-out regime, TU can disseminate information about all individuals in its database, unless the individual notifies TU that he or she does not want TU to share information about them to third parties. In contrast, under the opt-in regime, TU is not permitted to communicate any of its information about individuals in its database unless the individual affirmatively consents.

However, findings from empirical studies prove that an opt-in regime, unlike opt-out, would impose a great burden not only on information service providers like Trans Union, but also on all companies that collect, store, analyze, and share data about their customers. An emerging body of research indicates that an opt-in would be expensive, time-consuming, and

impractical if not impossible for the entity charged with obtaining affirmative consent for every individual in its database. Consequently, an opt-in regime amounts to an almost straight all-out ban on TU's ability to communicate information in its target marketing list.

Empirical evidence to data supports this. In 1997, U.S.West. (now Qwest Communications) conducted an affirmative consent case study to test the frequency and likelihood of actually obtaining consumer consent for the disclosure of their information. The results of the study revealed that a majority or 72% of individuals refused to grant consent when asked. The study conducted by U.S. West showed that "33% of those called refused to grant approval"; "28% granted such approval"; and "39% either hung up or asked not to be called again". *U.S. West, Inc. v. Federal Communications Commission*, 182 F.3d 1224, 1239 (10th Cir. 1999), *cert. denied* 528 U.S. 1188 (2000). The trial reveals the burdens associated with opt-in.

Additionally, the impact of an opt-in restriction on the dissemination of non-sensitive marketing data will also negatively impact nonprofit and charitable organizations. A recent study of nonprofit charitable organizations indicate that such organizations raised almost $80 billion in 2000 through the use of direct mail and telephone campaigns.[5] In doing so, these organizations spend approximately 41 cents to raise every dollar that is collected from their fundraising efforts. This figure includes the costs associated with executing a fundraising campaign, including labor, administrative costs, printing, postage and other related expenses. However, findings from a recent study of charitable and nonprofit organizations show that

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[5] Michael A. Turner, Ph.D., THE IMPACT OF DATA RESTRICTIONS ON FUNDRAISING FOR CHARITABLE & NONPROFIT INSTITUTIONS (forthcoming 2002). This study has been sponsored by the Information Services Executive Council (ISEC) and The Privacy Leadership Initiative (The PLI). It will *be available at* www.the-dma.org/isec and www.understandingprivacy.org

"should an 'opt-in' style third party data restriction become law, administrative costs for charitable organizations would increase by 30 percent, and would force charities to spend 53 cents to raise a dollar of donations due to the lower response rates." This would amount to the loss of "approximately $16.5 billion that is currently allocated to charitable programs that will be spent on additional marketing costs," should an opt-in data restriction be imposed. [6]

Moreover, the United Postal Services (USPS) is a major beneficiary of direct marketing and of free flow of information, because direct mail marketing generates nearly half of the U.S. Postal Service mail volume.[7] Restrictions placed on the disclosure and dissemination of non-sensitive marketing information will ultimately reduce the amount of mail volume and therefore dramatically reduce the USPS revenues as companies gravitate toward other advertising media such as cable television, e-mail, or print.[8]

Further, according to one recent study, an opt-in restriction on non-sensitive marketing information would likely impose an information tax on people who buy apparel through catalogs that would range from 3.5 to 11 percent.[9] This tax falls most heavily on economically disadvantaged inner city residents as well as consumers living in rural areas.

For instance, the average catalog shopper lives 3 miles further from the nearest shopping mall or major retail store than does the profile non-catalog shop-

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[6] *Id.*

[7] *Id.* at 277.

[8] Michael A. Turner, Ph.D., LIKELY IMPACT OF USPS ON RESTRICTIONS ON FREE FLOW OF INFORMATION (July 2001). This study is available at www.the-dma.org/isec under "white papers."

[9] Michael A. Turner, Ph.D., THE IMPACT OF DATA RESTRICTIONS ON CONSUMER DISTANCE SHOPPING (March 2001)This study was sponsored by the Privacy Leadership Initiative (The PLI) and the Information Services executive Council (ISEC). It is available at www.understandingprivacy.org.

per.[10] This would mean an additional 6 miles round trip to shop for apparel. Given that 70 percent of all catalog shoppers live in rural and suburban areas, it is safe to assume that a large number of catalog shoppers value the convenience for this reason. *Id.*

In economically disadvantaged inner city areas, apparel shoppers also rely heavily on catalogs as their neighborhoods are grossly underserved by brick-and-mortar retailers. Recent studies by The Boston Consulting Group and PricewaterhouseCoopers indicate that, in general, economically disadvantaged inner city residents also have less access to shopping centers and food stores than do their suburban counterparts.[11] Further, shoppers in economically disadvantaged inner city areas typically pay higher prices for goods and services and have fewer products to choose from.

Consequently, it is not surprising that mail order does well with economically disadvantaged inner city shoppers. *Id.* When asked to identify the store type bought from most often for women's apparel, 12 percent of African, 11 percent of white, and 9 percent of Hispanic inner city respondents indicated a preference for mail order catalogs, as compared to only 7 percent for the total population.[12] *Id.* Finally, inner city African American households report spending (in absolute dollars) more annually on apparel than the average U.S. household. Id. As can be seen, then, re-

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[10] *See* Elrick & Lavidge Marketing, RESEARCH DIRECT INTERACTIVE BUYING PRACTICES STUDY (1999). This study was commissioned by The Direct Marketing Association and sponsored by the United States Postal Service.

[11] The Boston Consulting Group in partnership with The Initiative for a Competitive Enterprise, THE BUSINESS CASE FOR PURSUING RETAIL OPPORTUNITIES IN THE INNER CITY (1998); Pricewaterhouse Coopers, Opt. Cit.

[12] Total U.S. population includes: urban (non-inner city); suburban, rural, and inner city. This indicates that inner city shoppers are far more reliant on distance shopping than suburban and urban non-inner city households.

strictions like those imposed on Trans Union reach into the diverse fabric of the American economy.

CONCLUSION

For the reasons stated above, the *amicus curiae* respectfully urges the U.S. Supreme Court to grant Trans Union's petition for writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TRANS UNION LLC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE COALITION FOR SENSIBLE PUBLIC RECORDS ACCESS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Coalition for Sensible Public Records Access ("CSPRA") is a not-for-profit organization dedicated to preserving the responsible commercial use of public record information. CSPRA sponsors research, publications, legislative briefings, and other activities designed to foster thoughtful debate about how privacy concerns can be addressed within the context of such use. CSPRA's members include the world's leading suppliers of information on consumers, businesses, motor vehicles, and property, including demographic and lifestyle data and database-marketing services; specialized business information products and services; decision-making intelligence and services for businesses, government agencies, and legal professionals; and consumer credit information and products. The decision below, if followed by other courts, could significantly affect their business activities and the services they provide their customers.

SUMMARY OF ARGUMENT

The decision of the D.C. Circuit in *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir.) ("*Trans Union II*"), *reh'g denied*, 267 F.3d 1138 (D.C. Cir. 2001) ("*Trans Union III*"), creates an important issue for this Court's review for four separate reasons. First, the D.C. Circuit misapplied this Court's holding in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), to create a new category of expression, less deserving of First Amendment protection, based solely on the D.C. Circuit's belief that the expression "concern[ed] no

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[1] No counsel for any party authored this brief in whole or in part. Petitioner Trans Union is a member of the Coalition for Sensible Public Records Access, but was not involved in the preparation of this brief. No other persons other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to its preparation or submission. The parties' counsel have consented to the filing of this brief, and letters reflecting that consent are submitted to the clerk's office with this brief.

public issue." *Trans Union III*, 267 F.3d at 1140 (quotation omitted). The court applied a defamation case involving false and harmful expression to determine the standard of First Amendment protection applicable to Petitioner's target marketing lists, which involve accurate, lawfully obtained information posing no threat of harm.

Second, the D.C. Circuit erroneously characterized Petitioner's target marketing lists as "solely of interest to the company and its business customers," *Trans Union II*, 245 F.3d at 818, despite overwhelming evidence that those lists are of significant interest to many U.S. consumers and businesses, and have a considerable impact on the U.S. economy.

Third, the D.C. Circuit purported to apply to its new category of expression the intermediate scrutiny traditionally reserved for restrictions on commercial speech, even though the court did not assert—much less demonstrate—that Petitioner's expression is commercial, and despite the Supreme Court's admonition in *Dun & Bradstreet* that "[w]e also do not hold . . . that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech." 472 U.S. at 762 n.8.

Fourth, while claiming to apply intermediate scrutiny, the D.C. Circuit failed to find that the government had borne its burden of proving that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree," as it was constitutionally required to do. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). In fact, the D.C. Circuit failed to find that the Federal Trade Commission ("FTC" or "Commission") had shown that the restriction served *any* interest, much less an important or substantial one.

The D.C. Circuit's decision threatens not only Petitioner's expression, but also the expression of the many businesses and organizations that rely on Petitioner's target marketing lists, and myriad other valuable uses of accurate, lawfully obtained information that undergird the information society. Given the

social and economic importance of these communications, the First Amendment protection applicable to them is a matter of great significance. Yet it is precisely these communications that the FTC seeks to restrict and from which the D.C. Circuit would withdraw constitutional protection. Because of the sweeping application of the D.C. Circuit's ill-founded "no matter of public concern" standard and the vital First Amendment interests at stake, the *amicus curiae* respectfully urges the Supreme Court to grant the petition for writ of certiorari.

ARGUMENT

I. BACKGROUND

In 1996, the D.C. Circuit determined that the FTC's application of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681, 1681a-1681u ("FCRA"), to restrict Petitioner from distributing target marketing lists presented "a serious First Amendment claim." *Trans Union Corp. v. FTC*, 81 F.3d 228, 235 (D.C. Cir. 1996) ("*Trans Union I*"). The court characterized the Commission's approach as requiring an "utterly wasteful expenditure of resources" and creating "what looks like a mickey-mouse exception" which "may well indicate a fatal lack of fit between the Act's goals and the FTC's means of enforcement." *Id.* Rather than rule on the constitutionality of the Commission's action at that time, however, the D.C. Circuit remanded the case "because of the very serious doubt whether Trans Union's lists are covered by the Act at all." *Id.*

Five years later, a different panel of the same court found that the First Amendment protection for Petitioner's expression had largely evaporated, because, the D.C. Circuit wrote, the target marketing lists "concerned no public issue." *Trans Union II*, 245 F.3d at 818 (quotation omitted). Relying solely on the plurality opinion of this Court in *Dun & Bradstreet*, the D.C. Circuit wrote:

> Like the credit report in *Dun & Bradstreet*, which the Supreme Court found "was speech solely in the interest of the speaker and its specific business audience," the information about individual consumers and their credit performance communicated by Trans Union target marketing lists is solely of interest to the company and its business customers and relates to no matter of public concern.

Id. at 818 (quoting *Dun & Bradstreet*, 472 U.S. at 762) (citations omitted). The D.C. Circuit, therefore, concluded that Petitioner's target marketing lists warranted "reduced constitutional protection." *Id.* (quotation omitted). Without stating what that reduced level of protection was or citing any evidence, the court determined that the FTC's action met the required standard, and so upheld the FTC's decision prohibiting Petitioner from communicating its lists without first obtaining affirmative opt-in consumer consent. *Id.* at 819.

On petition for rehearing, the D.C. Circuit again asserted that "[t]he important point is that here, as in *Dun & Bradstreet*, the targeted speech solely interests the speaker (Trans Union) and its 'specific business audience' (its customers)." *Trans Union III*, 267 F.3d at 1140 (quoting *Dun & Bradstreet*, 472 U.S. at 762). The court, however, went further to cite this conclusion as justification for ignoring Supreme Court cases that "struck down privacy-based restrictions on the publication of truthful information" and that required that restrictions on even commercial speech be narrowly tailored. *Id.* at 1141 (quotation omitted).

These errors threaten not only Petitioner's expression and that of the many businesses and organizations that rely on Petitioner's target marketing lists, but also meaningful First Amendment protection for the myriad other valuable uses of accurate, lawfully obtained information that undergird the information society. As a result, this case warrants the Supreme Court's review.

II. THE D.C. CIRCUIT ERRED IN APPLYING *DUN & BRADSTREET* TO CREATE A "NO MATTER OF PUBLIC CONCERN" STANDARD FOR TRUE, LAWFULLY-OBTAINED EXPRESSION.

The D.C. Circuit's application of *Dun & Bradstreet* to justify "reduced constitutional protection" for Petitioner's expression misapplies this Court's decision in that case, and ignores extensive Supreme Court precedent.

The issue before the Court in *Dun & Bradstreet* was whether the heightened constitutional protection that the Court had applied to false and defamatory speech in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), should be extended to a false and defamatory credit report that was communicated under a promise of confidentiality to five subscribers. 472 U.S. 751-53. The erroneous information—that Greenmoss Builders had declared bankruptcy—was, in the plurality's words, not merely "false," but "grossly misrepresented respondent's assets and liabilities." *Id.* at 751. The potential for that information to be used to harm Greenmoss Builders was obvious, and the severity of the resulting harm had already been demonstrated to be great.

The Court's conclusion that the speech was "solely in the individual interest of the speaker and its specific business audience," *id.* at 762, was relevant only because of these distinct features of the case. As the plurality in *Dun & Bradstreet* wrote: "This particular interest [the protection of false, defamatory expression] warrants no special protection when—as in this case—the speech is wholly false and clearly damaging to the victim's business reputation." *Id.*

In the present case, by contrast, there is no suggestion that the expression involved is either false or defamatory. The information contained in the lists provided by Petitioner—the names and mailing addresses of consumers meeting basic criteria (for example, the existence of two tradelines—*i.e.*, credit cards or revolving credit accounts, *Trans Union I*, 81

F.3d at 229-30)—poses no risk of harm to consumers. A consumer receiving an offer in which he or she is not interested can simply discard it, as this Court has repeatedly noted.[2] There is no suggestion that the information was or could be defamatory, embarrassing, or harmful in any way.

In addition, *Dun & Bradstreet* involved the distribution of detailed information about a business to subscribers who sought the data to determine whether or not to engage in a specific business transaction with the subject of the credit report.

Target marketing lists, by contrast, work in almost the opposite way. Petitioner's customers specify certain broad criteria, and Petitioner provides a list of consumers meeting those criteria. Information is not sought about a specific consumer. The customer then uses that information solely for the purpose of communicating with those consumers. The information is essential to the communication.

In sum, unlike the situation in *Dun & Bradstreet*, this case does not involve information sought about a specific consumer, the information that is revealed by the presence of a name on a list is very general and poses little if any risk of harm, the information is accurate, and Petitioner communicates it to its customers so that they can use the information to communicate with individual consumers.

In this context, *amicus curiae* respectfully submits that the D.C. Circuit was wrong to conclude that this case is controlled by *Dun & Bradstreet* or that the plurality opinion there justifies, much less mandates, a lower standard of First Amendment scrutiny of true, lawfully obtained lists of consumer names and addresses. The D.C. Circuit ignored this Court's admonition that "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield*, 507 U.S. at 767.

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[2] *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983); *see also Edenfield*, 507 U.S. at 776.

The D.C. Circuit's error threatens a wide range of speech that, under this Court's First Amendment jurisprudence, should receive full First Amendment protection. The expression put at risk by application of a "no matter of public concern" standard includes "the newspaper that discusses business affairs, almost entirely in order to make money by helping its readers do well in business," the "product review written by its author because he wants to be paid, published by the newspaper because it wants to keep its paying subscribers, and read by readers because they want to know how to best spend their money," and the "union buying TV ads urging people to 'Buy American' because that's the best way of maintaining the viewers' (and the union members') standard of living." Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1081-82 (2000).

The D.C. Circuit's willingness to reduce the standard of First Amendment protection for expression that it believes addresses "no matter of public concern" ignores the precedents of this Court and threatens a wide array of heretofore fully protected expression. Review by the Supreme Court is urgently needed.

III. THE D.C. CIRCUIT ERRED IN ITS ASSUMPTION THAT TARGET MARKETING LISTS ARE OF "NO PUBLIC CONCERN."

The D.C. Circuit also erred in its factual assumption that Petitioner's target marketing lists are "solely in the [individual] interest of the speaker and its specific business audience." *Trans Union II*, 245 F.3d at 818 (quotation omitted).

Trans Union prepares target marketing lists for many purposes. For example, the record below shows that Petitioner has provided lists to the Republican National Committee so that it might solicit campaign contributions (A0841-46, A2376-77),[3]

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[3] Citations to "A___" refer to the joint appendix in the D.C. Circuit.

and to the United Way so that it might solicit charitable donations (A2376). It is simply incorrect to characterize these communications as being "solely in the [individual] interest of the speaker and its specific business audience" and "relat[ing] to no matter of public concern," *Trans Union II*, 245 F.3d at 818 (quotation omitted), or to subject restrictions on those communications to less than full First Amendment scrutiny.

Petitioner also communicates lists of consumers to businesses so that they can market products and services. More than two-thirds of U.S. consumers—132 million adults—take advantage of direct marketing opportunities each year. DIRECT MARKETING ASSOCIATION, ECONOMIC IMPACT: U.S. DIRECT MARKETING TODAY (5th ed., 2000). In 2000, target marketing lists like those supplied by Petitioner generated $584 billion in sales to consumers—eight percent of all consumer sales. *Id.*

Petitioner's target marketing lists benefit more than just the businesses that use those lists to communicate with consumers and the 132 million consumers who respond to those communications each year. As Federal Reserve Board Governor Edward Gramlich testified before Congress in July 1999, "[i]nformation about individuals' needs and preferences is the cornerstone of any system that allocates goods and services within an economy," and the more such information is available, "the more accurately and efficiently will the economy meet those needs and preferences." *Financial Privacy, Hearings Before the Subcomm. on Financial Institutions and Consumer Credit of the House Comm. on Banking and Financial Services*, 106th Cong. (July 21, 1999) (statement of Edward M. Gramlich).

Targeted lists, like Petitioner's, make it possible for political parties, charitable organizations, and businesses to communicate directly to precisely those consumers who are most likely to be interested in the communications. This generates substantial benefits to the public. Target marketing lists increase the likelihood that only people likely to be

interested in an offer get one. This means that fewer people who are not likely to be interested receive one, thereby saving the business and its customers money, reducing unwanted mail (and the environmental waste it involves), and minimizing the burden on consumers having to sort through solicitations in which they clearly have no interest. This also means a higher response rate so the business, political party, or charity generates more revenue for every dollar it invests in the solicitation.

Target marketing lists benefit consumers in other ways as well. For consumers who are interested, they get an offer (often with a coupon or other discount) that they can use. The offer can be better (the product or service cheaper, or the discount greater) because of the precision with which it can be tailored. That tailoring is based on demonstrated preferences, not intrusive or time-consuming questioning or broad generalizations. Consumers also benefit from the increased competition and product specialization and innovation that target marketing makes possible.

It is simply untrue to assert that these communications are "solely in the [individual] interest of the speaker." *Trans Union II*, 245 F.3d at 818 (quotation omitted). Quite the contrary: the efficient targeting of marketing lists is of interest to all consumers. As the Federal Reserve Board has noted, "it is the freedom to speak, supported by the availability of information and the free-flow of data, that is the cornerstone of a democratic society and market economy." BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, REPORT TO THE CONGRESS CONCERNING THE AVAILABILITY OF CONSUMER IDENTIFYING INFORMATION AND FINANCIAL FRAUD 2 (1997). The D.C. Circuit's decision upholding the FTC's restriction on Petitioner's expression, "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Edenfield*, 507 U.S. at 766. The decision warrants

review by the Supreme Court.

IV. THE D.C. CIRCUIT ERRED IN APPLYING THE *CENTRAL HUDSON* COMMERCIAL SPEECH TEST TO PETITIONER'S EXPRESSION.

Although the D.C. Circuit based its decision to deny full First Amendment protection to Petitioner's expression on its assumption that the expression addressed "no matter of public concern," *Trans Union II*, 245 F.3d at 818, the court applied the First Amendment scrutiny developed by this Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980), and traditionally reserved only for reviewing restrictions on commercial expression.

Petitioner communicates the names and contact information of consumers meeting general selection criteria to its customers. This expression in no way "propose[s] a commercial transaction," as this Court has consistently required throughout the past decade as a condition for applying the intermediate scrutiny of *Central Hudson*. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 504 (1996) (quotation omitted); *see also Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995); *United States v. Edge Broad. Co.*, 509 U.S. 418, 426 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421 (1993). In fact, in *Dun & Bradstreet* itself, the Court specifically clarified that its decision was not intended to reduce the First Amendment protection afforded to credit reports: "We also do not hold . . . that the report is subject to reduced constitutional protection because it constitutes economic or commercial speech." 472 U.S. at 762 n.8.

While, as noted above, many customers use the information they receive from Petitioner to send commercial solicitations to individual consumers, this does not make Petitioner's expression commercial speech, any more than a reader acting on information he or she has read in a newspaper makes the newspaper commercial speech.

Moreover, the nature and purpose of communications that rely on Petitioner's target marketing lists vary widely. The communications seeking political and charitable contributions that relied on lists provided by Petitioner (A0841-46, A2376-77) are in no sense commercial, but they are impeded, if not effectively prohibited, by the restrictions on Petitioner's expression that the D.C. Circuit reviewed under intermediate scrutiny.

This contributes to explaining the importance of this case: The FTC's interpretation of the FCRA actually restrains two separate communications: (1) the communication by Petitioner of the list of names (and related contact information) meeting the customer's parameters; and (2) the customer's communication to the individuals whose names are contained on the list. By prohibiting Petitioner from communicating its lists, the Commission is restricting not only Petitioner's expression, but also that of its customers.

The D.C. Circuit's error is a significant one because it misstates the First Amendment standard of review applicable to a wide range of true, lawfully-obtained information that is used for communicating important information to consumers. Businesses, political parties, charities, and religious and fraternal groups all rely on computerized information, often obtained from third parties, to contact consumers, solicit members, motivate public interest, and serve other valuable needs of the organizations and of the public. The breadth of the D.C. Circuit's opinion, and the fact that is not grounded in any existing precedent, threatens a wide array of expression. Already, the United States District Court for the District of Columbia has cited the D.C. Circuit's erroneous statement as to the sway of *Dun & Bradstreet* in a decision reviewing the Gramm-Leach-Bliley Financial Services Modernization Act. *Individual Reference Servs. Group v. FTC*, 145 F. Supp. 2d 6, 40-41 (D.D.C.), *appeal filed*, No. 01-5202 (D.C. Cir. 2001). The magnitude of this threat justifies review by this Court.

V. THE D.C. CIRCUIT ERRED IN ITS APPLICATION OF INTERMEDIATE SCRUTINY.

A. The Court Did Not Require the Government To Demonstrate Either a Substantial Interest or That the Restraint on Petitioner's Expression Was Narrowly Tailored.

Even if the First Amendment standard of review applicable to commercial speech were applicable here, the D.C. Circuit established a new, emaciated version of that standard that conflicts with decisions of this Court.

Under this Court's precedents, the D.C. Circuit was obligated to determine whether the government's interest in restricting Petitioner from communicating its target marketing lists was "substantial, whether the challenged regulation advances these interests in a direct and material way, and whether the extent of the restriction on protected speech is in reasonable proportion to the interests served." *Edenfield*, 507 U.S. at 767.

This Court has repeatedly stressed that "[i]t is well established that '[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it,'" and that "[t]his burden is not satisfied by mere speculation or conjecture." *Id.* at 770 (quotation and citation omitted). "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 770-71. This necessarily requires a "careful[] calculat[ion of] the costs and benefits associated with the burden on speech imposed by its prohibition." *Cincinnati*, 507 U.S. at 417 (quotation omitted).[4]

[4] *See also Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985); *Bolger*, 463 U.S. at 71 n.20, 73-74; *In re R.M.J.*, 455 U.S. 191, 205-06 (1982); *Central Hudson*, 447 U.S. at 569-71; *Friedman v. Rogers*, 440 U.S. 1, 13-16 (1979); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977).

The D.C. Circuit wholly failed to perform the "careful calculation" required by this Court. As evidence of the substantiality of the government's interest the court offered only one sentence: "The 'Congressional findings and statement of purpose' at the beginning of the FCRA state: 'There is a need to insure that consumer reporting agencies exercise their grave responsibilities with . . . respect for the consumer's right to privacy.'" *Trans Union II*, 245 F.3d at 818 (quoting 15 U.S.C. § 1681(a)(4)). This one line constitutes the court's entire discussion of the importance of the interest being served by the Commission's ban on Petitioner's expression. This cannot meet the standard required by the Supreme Court.

The D.C. Circuit's analysis in *Trans Union II* of the link between the Commission's ban and the purpose it is alleged to serve similarly ignored Supreme Court precedent. In fact, that analysis consists entirely of negative statements excusing the ill-fit between means and objective: "Congress had no obligation to choose the least restrictive means of accomplishing its goal," *id.* at 819; "neither a perfect nor even the best available fit between means and ends is required," *id.* (quotation omitted). The D.C. Circuit clearly states what the FTC's ban is *not*, but it gives no indication of whether the ban satisfies the standard set forth by this Court.

In its denial of a Petitioner's petition for rehearing, the D.C. Circuit asserted—for the first time—that the Commission's ban "unquestionably advances the identified state interest." *Trans Union III*, 267 F.3d at 1141. Unfortunately, without a clearer understanding of what the state's interest is and in the absence of any explanation by the court, it is difficult to know how the D.C. Circuit reached this conclusion.

B. The Restriction on Petitioner's Expression Fails To Serve Any Plausible Interest.

The D.C. Circuit's quotation from the FCRA about a "'consumer's right to privacy,'" *Trans Union II*, 245 F.3d at 818 (quoting 15 U.S.C. § 1681(a)(4)), suggests two possible interests the FTC might assert its restriction on Petitioner's expression serves. One is protecting consumers from the disclosure of information contained in target marketing lists. The only information conveyed, however, is name, address, and the fact that the individual meets certain broad criteria, such as possessing two or more credit cards. This information is either inherently public or readily observable, and, in any event, poses little if any risk of harm to consumers. Moreover, under the FCRA, Petitioner is free to convey this information and much more detailed financial information to its customers, without obtaining individual consent, for the purpose of sending prescreened credit and insurance offers. 15 U.S.C. § 1681m. How can the far more limited information communicated about a customer in a target marketing list constitute a violation of his or her privacy rights?

Moreover, Petitioner provides its customers with target marketing lists for the sole purpose of enabling those customers to communicate with the consumers whose names are on the list. The information cannot be used for any other purpose. What privacy right is at stake and how does the communication of these lists offend it? The Court, citing to a long line of prior decisions, reasserted this past spring "that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech." *Bartnicki v. Vopper*, 532 U.S. 514, 534 n.21 (2001) (quotation omitted).

This was the view of the Tenth Circuit in *U.S. West, Inc. v. FCC*, when it struck down Federal Communication Commission rules requiring that telephone companies obtain opt-in consent before using data about customers' calling patterns to market products or services to them. 182 F.3d 1224

(10th Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000). The Tenth Circuit wrote that the government must show that the information the law would protect as private would inflict "specific and significant harm on individuals," and that:

> Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely. A general level of discomfort from knowing that people can readily access information about us does not necessarily rise to the level of a substantial state interest under *Central Hudson* for it is not based on an identified harm.

Id. at 1235. The D.C. Circuit's decision conflicts directly with this Tenth Circuit case.

The other possible privacy interest that the government might assert is to protect individual consumers from receiving unsolicited communications—commercial or otherwise. This Court, however, has consistently rejected the claim that unsolicited communications constitute a meaningful harm or warrant government restrictions on expression. Even if commercial (and only a portion of those communications facilitated by Petitioner's target marketing lists are), this Court has written: "If they are unreceptive to his initial telephone solicitation, they need only terminate the call. Invasion of privacy is not a significant concern." *Edenfield*, 507 U.S. at 776. As this Court stated in *Bolger*: "Recipients of objectionable mailings . . . may effectively avoid further bombardment of their sensibilities simply by averting their eyes." 463 U.S. at 72 (quotation omitted). "[T]he short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned." *Id.* (quotation omitted). "[W]e have never held that the Government itself can shut off the flow of mailings to protect those recipients who might potentially be offended." *Id.* Yet

this is precisely what the D.C. Circuit has permitted the FTC to do.

Consumer behavior seems to reflect the Court's view: fewer than three percent of consumers take advantage of opportunities to opt out of target marketing that have existed for more than thirty years.[5] In sum, it is impossible to discern what constitutionally cognizable harm the D.C. Circuit believes the FTC is preventing by restricting Petitioner's expression.

C. The D.C. Circuit Ignored the Fact That Opt-Out Is Substantially Less Restrictive of Petitioner's Expression Than Opt-In.

The D.C. Circuit disregarded its constitutional obligation, under the intermediate scrutiny standard it chose to apply, to ensure that the restraint on Petitioner's expression was narrowly tailored. The court rejected Petitioner's argument that an opt-out system would be substantially less burdensome than an opt-in system, with the cursory observation that "[a]lthough the opt-in scheme may limit more Trans Union speech than would the opt-out scheme the company prefers, intermediate scrutiny does not obligate courts to invalidate a 'remedial scheme because some alternative solution is marginally less intrusive on a speaker's First Amendment interests.'" *Trans Union III*, 267

[5] Since 1971, the Direct Marketing Association ("DMA") has operated the Mail Preference Service (and, more recently, the Telephone Preference Service and now the E-Mail Preference Service). With a single request to each, it is possible to be removed from most DMA-member company mailing, telephone, and e-mail solicitation lists. The DMA reports, however, that less than three percent of the U.S. adult population use the service. *Financial Privacy, Hearings Before the Subcomm. on Financial Institutions and Consumer Credit of the House Comm. on Banking and Financial Services*, 106th Cong. (July 20, 1999) (statement of Richard A. Barton). Financial institutions, retailers, and other businesses report similar or lower figures for their opt-out programs. *Privacy, Hearings Before the Senate Comm. on Commerce*, 107th Cong. (July 11, 2001) [hereinafter *Privacy*] (statement of Fred H. Cate).

F.3d at 1143 (quoting *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 217-18 (1997)).

The court's characterization of "opt-out" (under which consumers who do not want credit report information used in the creation of target marketing lists would express their objection) as "marginally less intrusive" on Petitioner's First Amendment-protected expression than "opt-in" (under which consumers who do want their credit report information used in the creation of target marketing lists would express their consent) is not merely unsupported, but ignores the hostility that the Supreme Court has shown to conditioning expression on opt-in consent. This Court has struck down ordinances that would require affirmative consent before receiving door-to-door solicitations, *Martin v. Struthers*, 319 U.S. 141 (1943), before receiving Communist literature, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), even before receiving "patently offensive" cable programming, *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996). Yet this is precisely what the FTC wishes to require Petitioner to obtain before it communicates its target marketing lists.

This Court's decision in *Edenfield*, striking down a Florida opt-in law applicable to commercial solicitations by certified public accountants, is directly on point: "In the commercial context, solicitation may have considerable value . . . . Florida's law threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." 507 U.S. at 766.

The D.C. Circuit also ignored the wealth of research demonstrating that it is far more expensive, and often impossible, for a potential user of information to obtain consumer consent for a use of information that the user already possesses.[6] U.S. West, one of the few U.S. companies to use an

[6] *See, e.g.*, MICHAEL A. TURNER & LAWRENCE G. BUC, THE IMPACT OF DATA RESTRICTIONS ON FUNDRAISING FOR CHARITABLE & NONPROFIT

opt-in system, found that to obtain permission to use information about its customer's calling patterns to market services to them required an average of 4.8 calls to each customer household before the company reached an adult who could grant consent. Brief for Petitioner and Intervenors at 15-16, *U.S. West,* 182 F.3d 1224 (No. 98-9518). In one-third of households called by U.S. West, the company never reached the customer, despite repeated attempts. *Id.* Mailed solicitations for opt-in consent are no more likely to reach consumers. The U.S. Post Office reports that fifty-two percent of unsolicited mail in this country is discarded without ever being read. *Briefs*, CIRCULATION MGMT., May 1999.

It is also more expensive for businesses to contact each consumer individually to seek consent to use information than for consumers to take advantage of existing business phone lines and customers service centers to opt out. U.S. West found that to obtain permission to use information about its customers' calling patterns to market services to them cost almost $30 per customer contacted. Brief for Petitioner and Intervenors at 15-16, *U.S. West,* 182 F.3d 1224 (No. 98-9518). And while U.S. West was contacting its own customers, with whom it already had an on-going relationship, Petitioner would be contacting people with whom it had no direct relationship.

INSTITUTIONS (2002); MICHAEL E. STATEN & FRED H. CATE, THE IMPACT OF OPT-IN PRIVACY RULES ON RETAIL CREDIT MARKETS: A CASE STUDY OF MBNA (2001); JOHN M. BARRON & MICHAEL E. STATEN, THE VALUE OF COMPREHENSIVE CREDIT REPORTING: LESSONS FROM THE US EXPERIENCE (2001); FRED H. CATE, OPT-IN EXPOSED (2001); MICHAEL A. TURNER, THE IMPACT OF DATA RESTRICTIONS ON CATALOG AND INTERNET APPAREL RETAILERS (2001); CYNTHIA GLASSMAN, CUSTOMER BENEFITS FROM CURRENT INFORMATION SHARING BY FINANCIAL SERVICES COMPANIES (2000); FRED H. CATE & MICHAEL E. STATEN, PROTECTING PRIVACY IN THE NEW MILLENNIUM: THE FALLACY OF "OPT-IN" (2000); ROBERT E. LITAN, BALANCING COSTS AND BENEFITS OF NEW PRIVACY MANDATES (1999); WALTER KITCHENMAN, US CREDIT REPORTING: PERCEIVED BENEFITS OUTWEIGH PRIVACY CONCERNS (1999).

This explains why much of the research on opt-in highlights the special burdens opt-in imposes on new market entrants and the development of new products and services by "rais[ing] barriers to entry by smaller, and often more innovative, firms and organizations." LITAN, *supra* note 6, at 4-5.

The presumption of opt-in that consumers do not wish to be contacted is unwarranted in light of the fact that two-thirds of American consumers make purchases in response to targeted offers, and fewer than three percent take advantage of opportunities to opt out. *Privacy*, *supra* note 5, (statement of Fred H. Cate).

The costs, inconvenience, and economic impact of opt-in appear all the more unjustified in view of the Court's characterization of the privacy interests at stake as "not a significant concern." *Edenfield*, 507 U.S. at 776. This may explain why opt-in is used so rarely in U.S. law. In the FCRA, for example, Congress required that consumer reporting agencies like Petitioner give consumers an opportunity to opt out—not opt in—to the processing of their most intimate financial information for the purpose of sending firm offers of credit or insurance. 15 U.S.C. § 1681m.

The D.C. Circuit ignored both legal precedent and extensive research and practical experience to conclude that opt-out was only "marginally less intrusive" on Petitioner's "First Amendment interests" than opt-in. *Trans Union III*, 267 F.3d at 1143 (quotation omitted). Most significantly, the D.C. Circuit identified no evidence at all for its conclusion that the FTC's restriction on Petitioner's expression was sufficiently narrowly tailored. The D.C. Circuit's silence contrasts starkly with the evidence on which the Supreme Court relied in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995), to uphold a Florida law restricting attorney solicitations. In that case, involving only a temporary restriction on solicitation of accident victims by licensed members of the bar, the Court cited to a "106-page summary of [the Florida Bar's] 2-year study of lawyer

advertising and solicitation" and an "anecdotal record . . . noteworthy for its breadth and detail." *Id.* at 626-27.

The existence of a widely used, less restrictive alternative to opt-in casts substantial doubt on whether the FTC's restriction on Petitioner's expression is narrowly tailored to serve a substantial interest.

The D.C. Circuit's failure to require the government to demonstrate that "the harms it recites are real and that its restriction will in fact alleviate them to a material degree," as required by this Court, *Edenfield*, 507 U.S. at 771, threatens not only Petitioner's expression, and that of its customers, but also that of similarly situated organizations that communicate information about consumers. Those communications undergird a substantial part of American commerce; they are valuable to consumers, businesses, and political and charitable organizations alike. They warrant, and under this Court's precedents are guaranteed, greater constitutional protection than that afforded them by the D.C. Circuit.

CONCLUSION

Because of the vital First Amendment interests at stake in the D.C. Circuit's application of a novel and sweeping "no matter of public concern" standard, and the broad social and economic importance of the information that the FTC seeks to restrict, the *amicus curiae* respectfully urges the Supreme Court to grant the petition for writ of certiorari.

Respectfully submitted,

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Supreme Court of the United States

TRANS UNION, LLC,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICUS CURIAE* CONSUMER DATA INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

With the consent of all parties,[1] amicus curiae, the Consumer Data Industry Association ("CDIA"), formerly known as Associated Credit Bureaus, Inc., submits its brief in support of Trans Union LLC's petition for writ of certiorari.

The CDIA is an international trade association, founded in 1906, and headquartered in Washington, D.C. CDIA's membership includes over 500 consumer credit, mortgage and other specialized consumer reporting agencies operating in the United States and throughout the world. CDIA is the largest trade association of its kind in the world. As part of its mission to support companies offering consumer information reporting services, CDIA establishes industry standards, provides business and professional education for its members, and produces educational materials for consumers describing consumer credit rights and the role of consumer reporting agencies in the marketplace.

In its more than ninety-year existence, CDIA has worked with the United States Congress and various state legislatures to develop laws and regulations governing the collection, use, maintenance, and dissemination of

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[1] Letters memorializing the consent of all parties to CDIA's filing of an amicus brief are on file with the Clerk of the Court. Petitioner is among the more than 500 credit reporting companies that are members of CDIA. Pursuant to Supreme Court Rule 37.6, CDIA states that this brief was authored entirely by CDIA and its counsel. No other person, entity, or counsel for any party made a monetary contribution to the preparation or submission of this brief.

consumer-related information, including credit reports. In this role, CDIA was a key participant in the legislative efforts which led to the enactment of the Fair Credit Reporting Act ("FCRA") in 1970 and its subsequent amendment. More recently, CDIA has published, maintained and updated a manual entitled *How to Comply with the Fair Credit Reporting Act*, which is used by CDIA's members.

Consumer reporting agencies include credit bureaus, mortgage reporting agencies, employment screening companies and other specialized consumer information reporting agencies. Consumer reporting agencies may obtain data from creditors, insurers, employers, landlords and other subscribers. Consumer reporting agency files may also include public record information, such as repossessions, bankruptcies, judgments and criminal records. Each month, over two billion pieces of data are entered into consumer-related data files held by consumer reporting agencies in the United States. Each of the nation's three largest consumer reporting agencies, Equifax, Experian, and Trans Union, maintains over 190 million consumer information files.

From their data files, CDIA's members provide more than one billion consumer reports annually to their customers. Creditors and insurers use the reports in making rapid and informed decisions which reduce the cost and increase the availability of credit and insurance.[2]

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[2] *See*, Walter Kitchenman, *US Credit Reporting: Perceived Benefits Outweigh Privacy Concerns* at 4 (The Tower Group 1999) <http://www.privacyalliance.org/resources/kitchenman.pdf> ("Transparency of consumer credit data is the foundation of

Employers rely on reports to screen out dishonest or dangerous employees. Landlords use residential screening reports to make informed decisions that protect their legitimate business interests and the safety of other tenants. Consumer reports are used by law enforcement agencies in investigations and counter-terrorist activities. In short, consumer reporting agencies provide the information infrastructure that contributes to the soundness, safety and efficiency of the employment housing, insurance, banking, finance, retail credit and law enforcement systems in the United States.[3]

CDIA is vitally interested in the outcome of this case because the court of appeals incorrectly stated the law regarding the constitutional analysis to be applied to government restrictions on the collection, maintenance and distribution of information from consumer reporting

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consumer credit in the US. Outstanding consumer loans exceed both government debt and corporate debt in the US, and constitute sixty percent or better of US gross domestic product (GDP).").

[3] It has been estimated that American consumers save $100 billion a year because of the efficiency and liquidity made possible by accurate consumer information. Fred H. Cate and Richard J. Varn, *The Public Record: Information Privacy and Access - A New Framework for Finding the Balance*, (1999) at 11, (citing Diogo Teixeira and Walter E. Kitchenman, *Bureaus Do a Credible Job*, The Banker (May 1998), at 104); Kitchenman, *US Credit Reporting*, at 7 (demonstrating that the accurate collection, maintenance and transfer of consumer reporting information provides for efficiencies in the secondary mortgage securities market saving consumers an average of 200 basis points on the cost of a mortgage).

agencies. Because CDIA has been involved in the consumer reporting industry for more than ninety years, and because it represents a variety of consumer reporting entities, CDIA believes that its experience allows CDIA to offer a unique perspective on the issues presented that will aid the Court in its decision.

SUMMARY OF ARGUMENT

This Court should grant Trans Union's petition for writ of certiorari to correct the court of appeals' misstatement of the law concerning the analysis that is applied to determine the level of First Amendment scrutiny used to evaluate governmental attempts to restrict speech by consumer reporting agencies.

This Court's well-settled precedent establishes that, in order to determine what level of scrutiny will be applied to restrictions on constitutionally protected speech, a reviewing court must first determine whether the speech implicates public or private concerns. This determination must be based on the content, form and context of the speech. The court of appeals' decision ignores this required analysis, substituting instead the blanket rule that when restrictions are applied to the information supplied by consumer reporting agencies to subscribers for a price, the speech at issue is necessarily of merely private concern, the restriction of which need only satisfy intermediate First Amendment scrutiny. The court of appeals' misstatement of the law represents a fundamental dilution of this Court's precedent regarding

the protection of consumer reporting agency speech provided by the First Amendment.[4] This error erodes the First Amendment freedoms essential to the efficient functioning of the American marketplace.

Because the court of appeals' misstatement of the law will affect the constitutional protection afforded consumer reporting agencies' speech beyond the facts of the *Trans Union* decision, the court of appeals' decision must be reversed.

ARGUMENT

I. THE COURT OF APPEALS' HOLDING CONTRADICTS THE PRECEDENT UPON WHICH IT RELIES.

Relying upon this Court's prior decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), the court of appeals denied Trans Union's petition for rehearing, holding that "Trans Union's target marketing lists comprise speech of purely private concern" entitled to only qualified constitutional protection and that the Federal Trade Commission's ("FTC") restriction on this speech should be reviewed under the intermediate scrutiny standard.[5] *Trans Union Corp. v. F.T.C.*, 267 F.3d

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[4] Although petitioner Trans Union has identified a number of other issues to be considered by the Court if its petition is successful, CDIA's brief is limited to the First Amendment error discussed herein.

[5] This Court's prior decisions have established that different standards of scrutiny are applied to determine the

1138, 1140-41 (D.C. Cir. 2001). In reaching this conclusion, the court of appeals emphasized that "[t]he important point is that here, as in *Dun & Bradstreet*, the targeted speech solely interests the speaker (Trans Union) and its specific business audience (its customers)." *Id.* at 1140.

The court of appeals' holding establishes a blanket rule that any consumer-related information provided by a consumer reporting agency to its customers for a price is always and only of private concern and can be regulated or entirely prohibited by laws or rules which only pass intermediate constitutional scrutiny. *See, Trans Union Corp. v. F.T.C.*, 245 F.3d 809, 819 (D.C. Cir. 2001) ("the FCRA is not subject to strict First Amendment scrutiny"). This result is contrary to this Court's holding in *Dun & Bradstreet* which requires a more discerning case-by-case (*i.e.*, "content, form, and context") analysis for each proposed restriction on speech, including speech subject to the provisions of the FCRA.

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constitutionality of speech restrictions depending upon the "public" or "private" concerns implicated by the speech. *Dun & Bradstreet*, 472 U.S. at 759. The highest level of protection, strict First Amendment scrutiny, is given to speech of public concern, and provides that the regulation of such speech will only be upheld if it promotes a compelling governmental interest and is the least restrictive means of furthering the articulated interest. *See, Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). A lower level of protection, intermediate First Amendment scrutiny, is given to speech of private concern, and provides that the regulation of such speech will be upheld if the asserted governmental interest is substantial and the regulation directly advances the interest and is no more extensive than necessary to serve the interest. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995).

In *Dun & Bradstreet*, this Court defined the issue before it as whether Dun & Bradstreet's "credit report involved a matter of public concern." *Id.* at 761. This Court then set forth the test to be used to resolve this issue, that is: "[w]hether . . . speech addresses a matter of public concern must be determined by [the expression's] content, form, and context . . . as revealed by the whole record." *Id.* (ellipses in original). Applying this test to the record before it, this Court concluded that Dun & Bradstreet's "credit report concerns no public issue" and "warrants no special protection" because it was "wholly false," was "clearly damaging to the victim's business reputation," and "was made available to only five subscribers, who, under the terms of their subscription agreement, could not disseminate it further. . . . " *Id.* at 762; *see also, U.D. Registry, Inc. v. State*, 34 Cal.App.4th 107, 115, 40 Cal.Rptr.2d 228, 232 (1995) (emphasizing the significance of the "defamation" context underlying the *Dun & Bradstreet* decision), *cert. denied*, 516 U.S. 1074 (1996)).

In reaching its holding in *Dun & Bradstreet*, this Court specifically *did not* find that credit reports are always and only of private concern. To the contrary, this Court emphasized the necessity of a careful case-by-case analysis:

> The dissent suggests that our holding today leaves *all credit reports* subject to reduced First Amendment protection. *This is incorrect*. The protection to be accorded a particular credit report depends on whether the report's "content, form, and context" indicate that it concerns a public matter. We also *do not hold*, as the dissent suggests we do, . . . that the report is

> subject to reduced constitutional protection because it constitutes economic or commercial speech.

Id. at 762 n. 8 (emphasis added).

Rather than apply the complete *Dun & Bradstreet* "content, form and context" analysis, the court of appeals concludes that the required analysis is satisfied merely by finding that the restricted speech is a consumer report subject to the FCRA. *Trans Union*, 267 F.3d at 1140. This truncated analysis is constitutionally inadequate and turns the holding of *Trans Union* into a blanket rule that all information reporting by consumer reporting agencies for a fee may be restricted or entirely prohibited if the intermediate scrutiny standard is satisfied.

II. THERE IS NO SUPPORT FOR THE COURT OF APPEALS' BLANKET RULE THAT CONSUMER REPORTING AGENCY SPEECH IS ALWAYS AND ONLY OF "PRIVATE" CONCERN.

This Court's prior decisions establish that merely because information is conveyed for a price, it does not thereby cease to be of "public" concern and may, in fact, still be entitled to the fullest protection afforded by the First Amendment. *See, e.g., Dun & Bradstreet*, 472 U.S. at 762 n. 8.; *accord Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."); *see also, Rubin*, 514 U.S. at 481

("the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' ").

Moreover, this Court's prior discussions of the First Amendment protection given to admittedly commercial speech reveal that the decision concerning the level of protection applied to particular speech must take into account the content, form, and context of the speech. *See, 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) ("The mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them."); *Virginia State Bd.*, 425 U.S. at 765 ("even if the First Amendment were thought to be primarily an instrument to enlighten public decision making in a democracy, we could not say that the free flow of [commercial] information does not serve that goal").

In its misapplication of the required *Dun & Bradstreet* analysis to the issue before it in *Trans Union*, the court of appeals ignored the purpose for which Trans Union provided the consumer information (*i.e.*, the context) and, instead, viewed the transaction as merely the sale by one business (Trans Union) of goods (target marketing lists) to another business with no further analysis. The consumer information communicated by Trans Union was, in fact, provided to marketers for the purpose of facilitating the free flow of information to perhaps millions of consumers, a societal benefit implicating public concerns, and therefore entitled to more than simply a blanket characterization as "private" commercial speech of lesser First Amendment value.

III. LEFT UNCORRECTED, THE COURT OF APPEALS' DECISION THREATENS FIRST AMENDMENT FREEDOMS ESSENTIAL TO THE VALUABLE MARKETPLACE OF INFORMATION.

Widely disseminated, accurate consumer information provides significant benefits to the public. As explained above, this information promotes credit availability to consumers and makes possible informed employment, housing and insurance decisions, all at lower cost than would otherwise be available.[6] Reliable consumer information also allows businesses to offer goods, services and credit opportunities to those specific consumers most likely to purchase or want them, thereby reducing the associated costs for the provider, increasing competition for consumers, and reducing the cost to the consumer. *See, e.g., Virginia State Bd.*, 425 U.S. at 765 n. 20 (noting that the free flow of information about pharmaceutical pricing was estimated to result in consumer savings of "very substantial magnitude" rendering it speech of public concern). In addition, consumer reporting agencies provide accurate and verifiable information to law

[6] *See*, Kitchenman, *US Credit Reporting*, at 8 ("Portable credit histories have freed both banks and consumers to be more cost [conscious] specialists. Consumers can shop [for] credit from the low cost provider, confident that they will evaluate the application against their entire credit history."); John M. Barron and Michael Staten, *The Value of Comprehensive Credit Reports: Lessons from the U.S. Experience*, at 1 (2000) <http://www.privacyalliance. org/resources/staten.pdf> ("credit bureau data has made a wide range of credit products available to millions of households who would have been turned down as too risky just a generation ago").

enforcement authorities and, where appropriate, to national security agencies.[7] Finally, consumer information is often used by non-profit and politically affiliated groups to contact and encourage potentially interested persons to participate in the political process or other community activities.

A court may conclude that not every type of information or disclosure by a consumer reporting agency is speech of public concern entitled to the highest level of First Amendment protection. While some consumer information is of public concern because it provides significant societal benefits, other such information may be entitled to lesser First Amendment protection. Moreover, other countervailing interests may weigh in favor of or against providing heightened First Amendment protection to certain forms of consumer information reporting. These countervailing interests are also of varying degrees of public import, deserving of more or less consideration depending upon the specific circumstances. *See, e.g., U.S. West, Inc. v. Federal Communications Commission*, 182 F.3d 1224, 1235 (10th Cir. 1999) ("privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy."). As this Court's prior decisions make clear, the balancing of these public and private interests is at the heart of the "content,

[7] *See*, 15 U.S.C. § 1681f (Disclosures to Government Agencies); 15 U.S.C. § 1681u (Disclosures to FBI for Counterintelligence Purposes); 12 U.S.C. § 1681v (Disclosures to Governmental Agencies for Counterterrorism Purposes).

form, and context" analysis which is required to determine the level of protection to be afforded particular speech. In holding that a consumer reporting agency's reporting of accurate consumer information for a price is always and only of "private" concern, the restriction of which is subject only to intermediate scrutiny, the court of appeals fails to apply this balance to its analysis.

The court of appeals' blanket rule threatens vital consumer reporting agency practices. If unchanged and relied upon by legislatures or other courts addressing similar restrictions on speech,[8] the court of appeals' decision promotes the erroneous assumption that additional restrictions on consumer information reporting will be subject to only intermediate scrutiny, regardless of the specific content, form or context of the speech. The consequences of such an eventuality caution against the departure from long-standing United States Supreme Court precedent. Because the American economy depends on the efficient and accurate reporting of consumer-related information, any obstruction of the free flow of this information must, under appropriate circumstances, be subjected to strict First Amendment scrutiny. Unless the court of appeals' decision is reversed as to the blanket rule that all consumer reporting agency speech for a price

[8] The court of appeals' blanket rule has already been relied upon in *Individual Reference Services Group, Inc. v. FTC*, 145 F.Supp.2d 6 (D.D.C. 2001) where the district court held that restrictions on the sale of credit header information is subject to intermediate scrutiny because the speech at issue "does not involve any matter of public concern." *Id.* at 40-41.

is of purely private concern, the First Amendment protection afforded such speech will be irreparably diminished.

CONCLUSION

For the reasons set forth above, Trans Union LLC's petition for writ of certiorari should be granted and the decision of the court of appeals should be reversed or modified in a manner consistent with this Court's prior decisions regarding the analysis to be employed in determining the level of constitutional scrutiny to be applied to governmental efforts to restrict consumer reporting agency speech protected by the First Amendment.

Respectfully submitted,

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No. 01-1080

IN THE
Supreme Court of the United States

TRANS UNION LLC,
Petitioner,

v.

FEDERAL TRADE COMMISSION
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus curiae addresses the following issue only:

Whether this Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), should be expanded, in a manner that conflicts with decisions of this Court and the lower courts, to eliminate full First Amendment protection for concededly truthful lists of selected names, addresses, and other information regarding consumers based on the theory that such speech by its nature does not relate to matters of "public concern."

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BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation and participates in administrative proceedings in a variety of areas, it devotes a substantial portion of its resources to protecting free speech rights, particularly the speech rights of the business community. WLF has appeared before this Court on numerous occasion in cases raising First Amendment issues. *See, e.g., Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). WLF recently successfully challenged the constitutionality of Food and Drug Administration restrictions on manufacturer speech. *Washington Legal Found. v. Friedman*, 13 F. Supp. 2d 51 (D.D.C. 1998), *appeal dism'd*, 202 F.3d 331 (D.C. Cir. 2000).

WLF fully supports Petitioner's request that the Court grant review on both of the Questions Presented in this Petition. WLF writes separately in order to emphasize its particular concern over the first Question Presented and the lower court's effort to carve out a new category of speech to which full First Amendment protection is inapplicable. The decision below constitutes a significant erosion of free speech rights and, if left uncorrected, would leave governments free

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

to prohibit a vast range of speech heretofore thought to be safe from government regulation.

WLF is filing this brief because of its interest in promoting the welfare of the business community and the public at large; it has no direct interest, financial or otherwise, in the outcome of this lawsuit. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of either party.

WLF is filing this brief with the consent of both parties. Letters of consent have been lodged with the Clerk of Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, Petitioner Trans Union LLC challenges the authority of Respondent Federal Trade Commission (FTC) to prohibit certain types of speech engaged in by Trans Union. The FTC alleges that the speech violates the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq*. Trans Union denies violating the FCRA and contends that, in any event, the FTC's efforts to prohibit its speech violate the First Amendment.

The speech at issue here consists of lists of names and addresses of consumers; companies buy these "target marketing" lists from Trans Union for the purpose of making phone or direct mail solicitations, offering to sell the consumers goods or services or soliciting political or charitable

contributions. Trans Union compiles these lists from data bases it maintains; the lists are of value to a marketer because they consist solely of individuals who share a characteristic (*e.g.*, individuals who possess a department store credit card) that, the marketer believes, will make the individuals more likely to respond to the marketer's sales pitch. *See* Petition Appendix ("Pet. App.") 2a.

In 1994, the FTC determined that this "target marketing" activity violated the FCRA; it ordered Trans Union to stop selling such lists.[2] Trans Union sought judicial review, contending that its activities were not covered by the FCRA and, in any event, were protected by the First Amendment.[3] In 1996, the U.S. Court of Appeals for the District of Columbia Circuit set aside the FTC's order, finding that the FTC had failed to justify its finding that

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[2] Trans Union engages in two types of "target marketing." In addition to the type outlined above, Trans Union provides lists of consumers who are to be contacted in connection with firm offers of credit or insurance. That second type of target marketing is not at issue in this case. The FCRA explicitly permits "firm offer of credit or insurance" target marketing, 15 U.S.C. § 1681b(c)(1)(B)(i), and the FTC does not challenge Trans Union's practices in this regard.

[3] The FCRA strictly regulates the dissemination of "consumer reports" by consumer reporting agencies such as Trans Union. Information supplied by such agencies is not a "consumer report" unless it "is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . credit . . . to be used primarily for personal, family, or household purposes" (or for several other purposes not relevant to this case). 15 U.S.C. § 1681a(d)(1). Trans Union disputed the FTC's contention that the lists of names and addresses it supplied were to be used in establishing consumers' eligibility for credit.

Trans Union's lists were "consumer reports." *Trans Union Corp. v. FTC*, 81 F.3d 228 (D.C. Cir. 1996).

On remand, the FTC (after conducting further hearings) stood by its initial decision and again ordered Trans Union to cease its target marketing activity. A different D.C. Circuit panel denied Trans Union's petition for review. Pet. App. 1a-15a. The court upheld as supported by substantial evidence the FTC's decision that Trans Union's target marketing lists were "consumer reports" and thus that Trans Union's activity violated the FCRA. *Id.* at 5a-10a.

The court also rejected Trans Union's claim that the ban on dissemination of target marketing lists violated Trans Union's First Amendment rights. The court initially determined that Trans Union's dissemination of target marketing lists was entitled only to "reduced" constitutional protection because such speech "is solely of interest to the company and its business customers and relates to no matter of public concern." *Id.* at 13a. Applying its "reduced" scrutiny to the FTC's speech prohibition, the court upheld the prohibition on the grounds that: (1) the government had a "substantial" interest in protecting the privacy of consumer credit information; (2) the manner chosen by the FTC to promote that interest was not overly burdensome; and (3) the FTC's prohibition could not be faulted as unconstitutionally "under-inclusive" merely because the government had failed to take action against many other activities (engaged in by consumer reporting agencies such as Trans Union as well as by numerous other companies) that result in disclosure of consumer information. *Id.* at 13a-15a.

On October 23, 2001, the D.C. Circuit denied Trans Union's petition for rehearing and rehearing *en banc*. In

connection with that denial, the panel issued a second opinion clarifying its earlier decision. *Id.* at 16a-23a. The court stated that its decision to apply "reduced" or "intermediate" First Amendment scrutiny to the FTC's actions was supported by this Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749 (1985). While acknowledging that the speech at issue in *Dun & Bradstreet* was "wholly false" speech and that the speech at issue here is truthful, the court claimed that nothing in *Dun & Bradstreet* indicated that the falsity of the speech was a factor in this Court's decision to apply reduced scrutiny to the speech regulations at issue there. *Id.* at 16a-17a. Rather, the "important point" in both *Dun & Bradstreet* and in this case was that the speech subjected to government regulation "solely interests" the speaker and its "specific business audience." *Id.* The court said that First Amendment interests trump privacy concerns only where the speech at issue involves "matters of public concern," and that "speech of largely private concern may warrant only qualified protection." *Id.* at 17a-18a. The court acknowledged that the FTC was distinguishing speech on the basis of content, but contended that such content-based restrictions do not warrant strict scrutiny when the speech at issue is commercial or is otherwise deserving of a lower level of protection. *Id.* at 18a-19a.

REASONS FOR GRANTING THE PETITION

This case raises First Amendment issues of exceptional importance. The decision below carves out a broad category of speech deemed of lesser importance and declares that the First Amendment does not fully protect such speech from government suppression. The D.C. Circuit cited only a single decision of this Court in support of its remarkable

holding: *Dun & Bradstreet, Inc. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). In fact, *Dun & Bradstreet* is wholly inapposite. Indeed, the decision below is inconsistent with numerous decisions of this Court; review is warranted to resolve the conflict between those decisions and the decision below.

Review is warranted for the additional reason that the decision below threatens to disrupt large segments of American commerce, and authorizes suppression of large amounts of speech -- both commercial and (as here) noncommercial in character -- not previously subject to any form of government regulation. The decision below held that speech that does not relate to a "matter of public concern" is not entitled to full First Amendment protection. The court failed to provide any meaningful definition of that term, but it apparently would limit full First Amendment protection to speech relating to issues that are the subject of debate in public forums. By establishing such a limited scope for First Amendment rights, the court denied full constitutional protection to the great majority of speech engaged in on a daily basis, speech that often is far more important to the daily lives of citizens than is speech concerning the "great issues" of the day. It would certainly come as a surprise to most Americans, for example, that (under the decision below) they cannot rely on full First Amendment protection for truthful information they disseminate about aspects of their neighbors' lives that are not "matters of public concern." Members of the business community, for whom the dissemination and receipt of information about private citizens is an indispensable part of their business affairs, now face the possibility that (based on the D.C. Circuit's rationale) such business activities could subject them to government sanction notwithstanding previous notions of

First Amendment rights. That large amounts of truthful speech will be chilled as a result of the decision below is inevitable. Because the decision below will have such a large impact on the daily lives of all Americans, review is urgently needed.

I. REVIEW IS WARRANTED BECAUSE THE CASE RAISES IMPORTANT ISSUES THAT AFFECT BILLIONS OF DOLLARS IN COMMERCE AND TOUCH ON THE LIVES OF ALL AMERICANS

The First Amendment "presupposes that the freedom to speak one's mind is not only an aspect of individual liberty -- and thus a good unto itself -- but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984). Nonetheless, there are certain limited categories of speech (*e.g.*, libelous speech, fighting words, obscenity, child pornography) that are either altogether outside the scope of freedom of speech or (as in the case of commercial speech) are entitled to reduced levels of First Amendment protection.

The D.C. Circuit now has added a new category of speech that it deems entitled to "reduced" First Amendment protection: speech that does not "relate to matters of public concern." Although the court failed to define the contours of this new category with any degree of precision, it is apparent that the category is far broader than any heretofore recognized by this Court and, indeed, appears to include the great majority of speech engaged in on a daily basis by most Americans.

The court made abundantly clear that this new category of less-than-fully-protected speech is not in any way synonymous with "commercial speech." Commercial speech, which is entitled to reduced-but-still-substantial First Amendment protection, has generally been defined as speech that "proposes a commercial transaction." *Central Hudson Gas & Electric Corp. v. Public Serv. Commn.*, 447 U.S. 557, 562 (1980). By providing names and addresses to its customers, Trans Union is not thereby advertising its services or otherwise proposing a commercial transaction. Accordingly, the speech at issue in this case does not constitute "commercial speech," and the D.C. Circuit did not contend otherwise.[4] Although the court looked to "commercial speech" case law in determining the proper level of First Amendment scrutiny for the FTC's speech suppression, it was careful to avoid any contention that Trans Union's speech was, in fact, "commercial speech."

This Court has never suggested that speech not falling within the definition of "commercial speech" is nonetheless entitled to reduced First Amendment protection simply because the speech arises in a commercial context. To the contrary, the Court has explicitly rejected the notion that a profit motive lessens the constitutional protection otherwise afforded to speech, stating, "Some of our most valued forms of fully protected speech are uttered for a profit." *Bd. of Trustees of State University of New York v. Fox*, 492 U.S. 469, 482 (1989). *See also, Consolidated Edison Co. v.*

[4] It will often be the case, of course, that a business will use the information it obtains from Trans Union to solicit business from prospective clients. Such solicitations would indeed be commercial speech, but the original communication of the customer information is not. *U.S. West, Inc. v. FCC*, 182 F.3d 1224 (10th Cir. 1999).

Public Service Comm'n of New York, 447 U.S. 530, 537 (1980). The Court has, for example, afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Indeed, because virtually all newspapers are published for the purpose of making a profit, little would remain of the freedom of the press if information conveyed in connection with a profit-making venture were not entitled to full First Amendment protection.

The D.C. Circuit did not apply reduced scrutiny to the FTC's actions because of the commercial nature of Trans Union's activities; it did so because it thought that the speech engaged in by Trans Union did not "relate to matters of public concern" and thus was not particularly important. The court stated that "the important point" in determining that Trans Union's speech was not entitled to full First Amendment protection was that "the targeted speech solely interests the speaker (Trans Union) and its 'specific business audience' (its customers)." Pet. App. 17a (quoting *Dun & Bradstreet*, 472 U.S. at 762). The same could be said of the great majority of speech engaged in by Americans, whether spoken in a commercial or noncommercial setting. The appeals court has thus created a huge exception to the First Amendment that threatens to undermine free speech protections. In light of the vast amount of speech now subject to government prohibition as a result of the D.C. Circuit's new rule, review is urgently needed.

The effect of the ruling on the business community alone is staggering. For example, the ability of the business community to engage effectively in direct marketing is largely dependent on its ability to obtain the kind of information supplied by Trans Union to its target marketing

customers. A significant portion of all consumer transactions in this country are the result of direct marketing activity. In 2000, direct marketing sales amounted to $938 billion, or an average of $3,478 for every American. Direct Marketing Association, ECONOMIC IMPACT: U.S. DIRECT MARKETING TODAY (5th ed., 2000). Consumers sales resulting from direct marketing have been growing over the past decade at an average annual rate of 9.1%, almost double the average growth rate for overall consumer sales. *Id.* The direct marketing industry supports 14.7 million U.S. jobs. *Id.* Those sales and jobs would be placed in jeopardy if the D.C. Circuit's restrictions on First Amendment rights were adopted nationwide.

The FCRA does not, of course, impose restrictions on *all* businesses that supply mailing lists to other businesses and charities; it focuses chiefly on "consumer reporting agencies" such as Trans Union. *See* 15 U.S.C. § 1681a(f). But the D.C. Circuit's decision is not so limited; it announces a rule that would grant government the power to prohibit *any* company from supplying consumer mailing lists to customers, free from normal First Amendment constraints. Moreover, the decision below is not limited to consumer mailing lists; virtually any information supplied by one company to another is now subject to strict government control or prohibition because only rarely will such information "relate to matters of public concern," as opposed to matters bearing solely on the private economic interests of the companies involved. The fundamental premise of the First Amendment is that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). The decision below undercuts

that premise by denying full First Amendment protection to such a broad range of speech.

The decision below also has huge implications for speech outside commercial settings. If, as the D.C. Circuit held, speech by private individuals is subject to "reduced" First Amendment protection if it involves matters of "largely private concern," then much of the speech that we all engage in on a daily basis now lacks the full First Amendment protection that many had come to expect. Presumably, the D.C. Circuit would hold that it is not a matter of "public concern" whether an individual who has not thrust himself into the public limelight is a homosexual or a former member of the Ku Klux Klan, or has served a prison sentence for a criminal conviction. Thus, an individual facing government sanction for revealing truthful information of that nature about a neighbor would not be entitled to full First Amendment protection under the D.C. Circuit's standard.[5]

In cases of that sort, at least it is arguable that the individual about whom information is being revealed has a privacy interest in avoiding the disclosure of intensely embarrassing facts. But the D.C. Circuit made no effort to cabin its decision to cases involving personal information that a reasonable person would have strong reason to keep private. Indeed, the court stripped Trans Union of full First

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[5] The scenario outlined above is hardly fanciful. *See, e.g., Diaz v. Oakland Tribune*, 188 Cal. Rptr. 762 (Cal. App. 1983) (First Amendment does not bar tort action against newspaper that disclosed that student body president was a transsexual); *Briscoe v. Reader's Digest Ass'n*, 483 P.2d 34 (Cal. 1971) (tort liability imposed on magazine for revealing that plaintiff had been convicted 11 years earlier of armed robbery; the article served no "public purpose" because the plaintiff was "rehabilitated" and had "paid his debt to society").

Amendment protection even though Trans Union's disclosures were limited to names, addresses, and the minimal inferences that could be drawn from a consumer's inclusion on a specific target list; and even though Trans Union will not include the names of any consumers who make known their objection to inclusion. By making clear that speech of "largely private concern" lacks full First Amendment protection regardless whether it reveals any information whose dissemination would cause any reasonable concern, the D.C. Circuit has created a new First Amendment exemption with alarmingly broad scope. Review is warranted in light of the importance of the opinion below to a broad range of truthful speech.

II. REVIEW IS WARRANTED BECAUSE THE LOWER COURT DECISION CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT IN CREATING A NEW CATEGORY OF SPEECH TO WHICH REDUCED FIRST AMENDMENT SCRUTINY IS APPLICABLE

In recognizing a First Amendment exception for speech that does not relate to "matters of public concern," the D.C. Circuit claimed to be relying on this Court's opinion in *Dun & Bradstreet*. In fact, *Dun & Bradstreet* provides no support for the D.C. Circuit's decision. Indeed, the D.C. Circuit's decision conflicts with numerous decisions of this Court. Review is warranted to resolve that conflict.

In *Dun & Bradstreet*, the Court held that the First Amendment does not prohibit States from permitting the award of presumed or punitive damages in libel cases involving wholly false speech where the defamatory statements do not involve matters of public concern, even in the

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absence of a showing of "actual malice." *Dun & Bradstreet*, 472 U.S. at 755-61 (plurality). The Court thus declined to extend its ruling in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held that a showing of "actual malice" was required before such damages could be awarded in libel cases in which the false and defamatory statements *did* involve matters of public concern. The D.C. Circuit interpreted *Dun & Bradstreet* as establishing a rule that *all* speech not relating to "matters of public concern" is entitled to a reduced level of First Amendment protection, regardless whether the speech is truthful. It rejected Trans Union's efforts to distinguish this case on the ground that, unlike in *Dun & Bradstreet*, the speech at issue here is truthful:

> To be sure, Trans Union's lists are not "wholly false," as was the *Dun & Bradstreet* credit report. . . . Nothing in *Dun & Bradstreet*, however, suggests that th[is] factor[] w[as] critical to the Court's decision. The important point is that here, as in *Dun & Bradstreet*, the targeted speech solely interests the speaker (Trans Union) and its "specific business audience" (its customers).

Pet. App. 16a-17a (quoting *Dun & Bradstreet*, 472 U.S. at 762).

The D.C. Circuit has badly misinterpreted *Dun & Bradstreet*. That decision -- in which there was no majority opinion[6] -- did not indicate that *all* speech that does not relate

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[6] Only three justices joined the plurality opinion. While Chief Justice Burger and Justice White concurred in the 5-4 judgment, both would have overruled *Gertz* and would have held that presumed and (continued...)

to "matters of public concern" is entitled only to reduced First Amendment protection. Rather, the plurality stated that *false* speech that does not relate to "matters of public concern" is entitled to less First Amendment protection than false speech that *does* relate to "matters of public concern":

> These factors indicate that petitioner's credit report concerns no public issue. It was speech solely in the individual interest of the speaker and its specific business audience. [Citations omitted.] This particular interest warrants no special protection *when -- as in this case -- the speech is wholly false and clearly damaging to the victim's business reputation.*

Id. at 762 (plurality) (emphasis added).

The plurality could not have been clearer that it was judging the level of First Amendment protection to be afforded *false* speech that "concerns no public issue," *not* the level of protection to be afforded *all* speech that "concerns no public issue." As the Court has made plain on numerous occasions, false speech is generally entitled to *no* First Amendment protection, *Bose Corp.*, 466 U.S. at 504 & n.22, because "there is no constitutional value in false statements of fact." *Gertz*, 418 U.S. at 340. In the context of defamation actions, the Court has nonetheless provided "special" First Amendment protection to false statements of fact on issues of public concern because "a rule of strict liability that compels

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[6](...continued)
punitive damages are available without a showing of "actual malice" in a libel case brought by a private figure, *regardless* whether the false speech involved a matter of public concern. *Dun & Bradstreet*, 472 U.S. at 762-64 (Burger, C.J., concurring in the judgment); *id.* at 765-74 (White, J., concurring in the judgment).

a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship." *Id.* In order to avoid this chilling effect on the exercise of First Amendment rights, *Gertz* held that a defamation plaintiff must demonstrate "actual malice" (*i.e.*, knowledge of falsity or reckless disregard for the truth) in order to recover presumed or punitive damages based on a showing that the defendant's statements were false. *Id.* at 349-50. The *Dun & Bradstreet* plurality saw no reason to extend that "special protection" to false statements that did not relate to matters of pubic concern because there was "no credible argument" that the absence of such "special protection" would have a chilling effect on truthful speech. *Dun & Bradstreet*, 472 U.S. at 762 (plurality). In particular, the plurality thought truthful credit reporting of the type at issue was "hardy" and thus unlikely to be deterred by "incidental state regulation" of false credit reporting. *Id.* at 762-63 & n.9. In other words, the plurality declined to extend *Gertz* not because it believed that all speech not related to matters of public concern was entitled to reduced First Amendment protection, but because it believed that *false* speech not related to matters of public concern was entitled to *no* First Amendment protection.

Indeed, the plurality would have had little reason to be concerned by the possible chilling effect of its decision on truthful speech "not related to matters of public concern" if it really had believed -- as the D.C. Circuit held -- that all such speech is entitled to only "reduced" First Amendment protection. In sum, *Dun & Bradstreet* -- the *only* decision relied on by the court below in creating a new category of speech to which full First Amendment protection is inapplicable -- provides *no* support for the D.C. Circuit's position.

Moreover, the D.C. Circuit's decision granting reduced First Amendment protection to truthful speech "not related to matters of public concern" -- a category that includes the majority of all speech -- conflicts with numerous decisions of this Court. Indeed, the Court recently reiterated, "As a general matter, 'state action to punish the publication of truthful information seldom can satisfy constitutional standards.'" *Bartnicki v. Vopper*, 121 S. Ct. 1753, 1761 (2001) (quoting *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102 (1979)). The Court has repeatedly made clear that, other than speech falling into the very limited categories described above, speech cannot be deemed less deserving of protection based on its subject matter. *See, e.g., Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").[7]

Although the Court has recognized that privacy concerns may properly enter into the First Amendment calculus, in *every* case where privacy interests have come into conflict with First Amendment rights, the Court has refused to allow those interests to trump First Amendment interests in disseminating truthful information and has refused to reduce the level of First Amendment protection based on claims that the information was "private." For example, the Court granted full First Amendment protection to a tort defendant that

[7] It is of no moment that, at least according to the FTC, Congress intended to prohibit the type of speech engaged in by Trans Union in order to protect privacy interests. No deference to such a legislative determination is warranted in a First Amendment case. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

published the name of a rape victim, despite indicating that the victim's name (as distinguished from the fact that the rape occurred) was not a matter of public concern. *Florida Star v. B.J.F.*, 491 U.S. 524, 536-37 (1989). Although stating that it did not "rule out the possibility" that, under some circumstances, privacy interests might be sufficient to overcome First Amendment protections and thus to allow imposition of civil sanctions for truthfully disseminating a rape victim's name, *id.* at 537, the Court noted pointedly that "our decisions have *without exception* upheld the press' right to publish" information of only private concern. *Id.* at 530 (emphasis added).[8]

One would be hard-pressed to come up with an example of speech of less "public concern" than the speech at issue in *Hustler Magazine v. Falwell*, 485 U.S. 45 (1988). The speech consisted of a magazine "parody" of an advertisement for Campari Liqueur, in which Rev. Jerry Falwell was the

[8] The Court threw out the tort judgment because, *inter alia*, the Florida statute prohibiting publication of rape victims' names was underinclusive -- it prohibited dissemination by newspapers and the broadcast media but not by others. The Court held that such "underinclusiveness" was fatal under the First Amendment: "When a State attempts the extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smallest disseminator as well as the media giant." *Id.* at 540. *See also, id.* at 541-42 (Scalia, J., concurring in part and concurring in the judgment). The contrast between *Florida Star* and the decision below is particularly striking with respect to the underinclusiveness issue. The D.C. Circuit permitted the FTC to prohibit Trans Union from disseminating its target marketing lists, despite acknowledging that the FTC's prohibition addressed only a small fraction of all marketing lists. Pet. App. 14a-15a.

principal character depicted.[9] The Court nonetheless afforded full First Amendment protection to the parody, and held that the First Amendment prohibited the imposition of liability against the magazine for the tort of intentional infliction of emotional distress, in the absence of evidence that the parody contained any false statements of fact. *Id.* at 55-56. To the extent that the D.C. Circuit intended its decision to apply to all speech that does not relate to matters of public concern, the decision is in clear conflict with *Hustler*.

The decision below is also in conflict with this Court's decision in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). One of the reasons given by the D.C. Circuit for affording "reduced" First Amendment protection to Trans Union's speech was its limited circulation: Trans Union supplies each of its target marketing lists to a limited number of paying customers. Pet. App. 13a. That rationale directly conflicts with *Givhan*, which held that speech is not to be afforded a lower level of First Amendment protection simply because the speaker chooses not to speak to a wide audience. *Givhan*, 439 U.S. at 414.

In an analogous context, the Court has explicitly rejected the public concern/private concern dichotomy embraced by the D.C. Circuit. One of the issues addressed in *Gertz* was whether to extend the *New York Times v.*

[9] Although the Court deemed Rev. Falwell a "public figure," *Hustler*, 485 U.S. at 57, there was no pretense that the parody was intended as a comment on any public issue; indeed, included at the bottom of the page was the disclaimer, "ad parody -- not to be taken seriously." *Id.* at 48. The parody quoted Rev. Falwell as stating that he had lost his virginity "during a drunken incestuous rendezvous with his mother in an outhouse." *Id.*

Sullivan rule to all speech involving matters of "general or public interest." *Gertz* rejected that approach, in part because of the difficulty entailed in determining which communications "address issues of 'general or public interest' and which do not." *Gertz*, 418 U.S. at 346. That concern applies equally here; the D.C. Circuit made no effort to define the contours of speech that does not relate to matters of public concern or how courts should go about distinguishing it from speech that *does* relate to matters of public concern.

This case does not involve an effort by the government to deny access to information. *Cf. Los Angeles Police Dep't v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999). Trans Union has lawfully obtained the information on its target marketing lists without assistance from the government. Once information is "lawfully obtained," this Court has allowed "the state [to] punish its publication" only in the rarest of circumstances, even when the information does not relate to a matter of public concern. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104 (1979).[10]

As noted above, the Court has indicated that it might be willing to permit the suppression of truthful information of a personal nature in rare circumstances, such as where the release of information might be intensely embarrassing. *Florida Star*, 491 U.S. at 537 (disclosure of name of rape

[10] In *Smith*, the information at issue was the name of an individual being charged as a juvenile offender. That information was kept confidential by the state (as was routine in all juvenile proceedings), but a newspaper had obtained the name using "routine newspaper reporting techniques." *Id.* at 183.

victim).[11] But it has never suggested that privacy concerns should ever result in speech restrictions being judged under some lowered First Amendment standard. Nor has it suggested that truthful speech can be suppressed entirely based on the rather minor intrusions on privacy caused by Trans Union's dissemination of the names and addresses of consumers. The D.C. Circuit's holding to the contrary cuts against a long line of First Amendment decisions from this Court. The Court should grant review in order to resolve that conflict.

CONCLUSION

Amicus curiae respectfully requests that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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Date: March 25, 2002

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[11] In general, courts have been more willing to suppress truthful speech on "intense embarrassment" grounds when the speech takes the form of photographs or recordings. *See, e.g., Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229 (7th Cir. 1993) (Posner, J.) (picture of an individual using a bathroom stall); *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp. 2d 823, 841-42 (C.D. Cal. 1998) (unauthorized broadcast of a tape of a private sexual encounter between a famous actress and a rock star). The mere publication of embarrassing but truthful *facts* generally has been insufficient for the imposition of liability. *See, e.g., Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2d Cir. 1940) (embarrassing facts about a former child prodigy later found living as an eccentric recluse). *See generally*, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, PROSSER & KEETON ON LAW OF TORTS, § 117, at 857 (5th ed. 1984).

SUPREME COURT OF THE UNITED STATES

TRANS UNION LLC v. FEDERAL TRADE COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01–1080. Decided June 10, 2002

The petition for a writ of certiorari is denied.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, dissenting from denial of certiorari.

Petitioner Trans Union LLC is one of three major credit reporting agencies in the United States. Its business consists of three activities: (1) traditional credit reporting; (2) prescreening individuals for offers of credit or insurance; and (3) the creation of target marketing lists. The lists in the third category are at issue in this case. They contain the names and addresses of individuals who meet specific criteria such as having obtained an auto loan or two or more mortgages, or having a department store credit card. Marketers purchase these lists, then contact the individuals by mail or telephone to offer them goods and services.

In 1994, the Federal Trade Commission (FTC) issued a decision holding that the information communicated by petitioner's target marketing lists were "consumer reports," the sale of which is prohibited by the Fair Credit Reporting Act (FCRA), 84 Stat. 1128, 15 U. S. C. §1681 *et seq*. The Court of Appeals for the District of Columbia Circuit rejected petitioner's subsequent First Amendment challenge to the FTC's decision. 245 F. 3d 809 (2001). Relying on our decision in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749 (1985), the Court of Appeals held that the information communicated by petitioner's target marketing lists is subject to reduced consti-

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tutional protection because it "is solely of interest to the company and its business customers and relates to no matter of public concern." 245 F. 3d, at 818. The court determined that the FTC's ban survived this reduced level of scrutiny despite two arguments from petitioner. First, petitioner urged that an opt-out requirement would be a less restrictive means to achieve the Government's stated purpose. Second, petitioner argued that the FTC's decision does little to protect consumer privacy because credit card companies are still permitted to make widespread disclosures of more invasive information about consumers.

In my view this case meets the standards for review by this Court. The plurality opinion in *Dun & Bradstreet* concluded that a false statement in a credit report was not speech on a matter of public concern, as that term is used in the context of defamation law. It is questionable, however, whether this precedent has any place in the context of truthful, nondefamatory speech. Indeed, *Dun & Bradstreet* rejected in specific terms the view that its holding "leaves all credit reporting subject to reduced First Amendment protection." 472 U. S., at 762, n. 8. The Court of Appeals, nonetheless, relied on *Dun & Bradstreet* to denigrate the importance of this speech. A grant of certiorari is warranted to weigh the validity of this new principle.

Even accepting the Court of Appeals' distinction between public and private speech, it appears that petitioner's speech touches upon matters of public concern. The Government concedes the speech is essential to the purchasing decisions of millions of Americans. In addition, many charitable and political organizations use the information provided in petitioner's marketing information to solicit support for their causes.

In light of the fact that the FCRA permits prescreening—the disclosure of consumer reports for target marketing for credit and insurance, §1681b(c)(1)(B)(i)—the FTC's deci-

sion to ban target marketing lists is nonsensical. Prescreening entails the disclosure of detailed credit performance information, including bill payment history. Release of this information is far more invasive of consumer privacy than release of the names and addresses contained in petitioner's target marketing lists. Like target marketing, prescreening touches a vast majority of American adults; credit providers extended close to 1.8 billion credit prescreening offers to American consumers in 1997. And the public value of prescreening is not obviously greater than that provided by other forms of target marketing; only about 1 to 2 percent of consumers who receive prescreening offers respond to them.

This case has important practical implications. Petitioner, one of only three major credit reporting agencies in the United States, faces bankruptcy as a result of the decision of the Court of Appeals. Petitioner has been named as a defendant in a series of class actions brought under the FCRA, allegedly on behalf of the 190 million individuals in petitioner's database. Because the FCRA provides for statutory damages of between $100 and $1,000 for each willful violation, petitioner faces potential liability approaching $190 billion. If the Court of Appeals' decision is given collateral-estoppel effect in these class actions (as the class-action plaintiffs seek), petitioner will face crushing liability. The company's demise will have adverse effects on both the national economy and petitioner's thousands of employees.

This case is of national importance, and the Court of Appeals has adopted a novel approach to commercial speech. I would grant the petition for certiorari.